Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

JEFFREY A. GRUSENMEYER & ASSOCIATES, INC.,
Petitioner,

v.

DAVISON, SMITH & CERTO ARCHITECTS, INC.,
WILLIAM R. DAVISON
RANDALL S. SMITH
JEFFREY M. CERTO,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether architectural drawings of existing conditions should be denied copyright protection as a categorical rule.

Whether the phrase in an architect's contract that says he would prepare "plans, renderings, and perspectives suitable for use in presentation and future reference" by his client, should be construed by a court to permit a competing architect to copy, adapt, distribute, and display those works as its own without considering the effect of the Copyright Act of 1976 on the contract language.

RULE 29.6 STATEMENT AND PARTIES TO THE PROCEEDING

The parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Petitioner: Jeffrey A. Grusenmeyer & Associates, Inc.

Respondents: Davison, Smith & Certo Architects, Inc., William R. Davison, Randall S. Smith, and Jeffrey M. Certo.

Petitioner Jeffrey A. Grusenmeyer & Associates, Inc. has no parent corporation, and no publicly held corporation owns more than 10% of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Jeffrey A. Grusenmeyer & Associates, Inc. ("Petitioner") respectfully petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case, in order to resolve a conflict between the Sixth Circuit, which holds that architectural drawings of existing conditions are not eligible for copyright protection, and the Second Circuit's decision in *Sparaco v. Lawler, Matusky & Skelly Engineers LLP*, 303 F.3d 460 (2nd Cir. 2002) which holds that a site plan depicting existing conditions can be copyrightable, and for review of the degree of deference courts must show the Copyright Act of 1976 in state law contract interpretation.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is dated January 8, 2007—it is not published in the Federal Reporter, but is published at *Jeffrey A. Grusenmeyer & Associates, Inc. v. Davison, Smith & Certo Architects, Inc., et al.*, 212 Fed. Appx. 510, 2007 WL 62620 (6th Cir. 2007). (App.C 5a-14a). The order of the Sixth Circuit denying Petitioner's timely filed petition for rehearing was denied on May 1, 2007. (App.B 3a-4a). The opinion and order of the district court granting Respondents' motion for summary judgment and denying Petitioner's motion for summary judgment is dated January 25, 2006, and available at 2006 Copr. L. Dec. P. 29114, 2006 WL 208795 (N.D. Ohio 2006). (App.D 15a-28a). The order of the district court entering final judgment is unreported. (App.E 29a-30a).

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on January 8, 2007. The timely filed Petition for Panel Rehearing and Suggestion for Rehearing En Banc was denied on May 1, 2007. Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the denial of rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This is an action for copyright infringement arising under the Copyright Act of 1976, 17 U.S.C. § 101 *et seq*.

STATEMENT OF THE CASE

At issue are Petitioner's U.S. registered copyrights in architectural works (registration number VAu-550-604) and technical drawings (registration number VAu-584-268). Both registered works include Petitioner's architectural drawings of existing conditions of the campus of Magnificat High School, along with Petitioner's proposed parking lot modifications and design for a new performing arts center. (Representative samples of the registered drawings are included in Appendix G 35a).

In June of 1999, Petitioner contracted with Magnificat High School in Rocky River, Ohio to provide architectural services that included preparation of a Master Plan "for the implementation of the capital improvements program, including plans, renderings, and perspectives suitable for use in presentation and future reference during master plan implementation." (App.D 16a). Petitioner incorporated AIA Document B151: Abbreviated Form of Agreement Between Owner and Architect, 1987 Edition, in the contract with

Magnificat, which expressly reserved his copyright interest in documents produced under contract. (App.D 27a).

While working on the Master Plan, Petitioner also authored architectural works and technical drawings that pertained to a proposed performing arts center addition to Magnificat for his own use later as a potential bidder. (App.F 31a-32a). Using AutoCAD®, a Computer Aided Design ("CAD") software application, Petitioner created his drawings by extracting factual information from old site plans and construction drawings, checking and measuring the campus, selecting and arranging the material to be depicted, and then drawing his own expression of the campus, along with proposed additions, using his own symbols. (App.F 32a-33a). Petitioner subsequently registered those architectural works and technical drawings with the U.S. Copyright Office. (App.F 32a).

In March 2000, sixth months after completion of the Master Plan, Petitioner provided a set of his electronic AutoCAD® drawings as a personal favor to Don Koma, Facilities Director of Magnificat. Magnificat later gave copies of those files to Respondents. Respondents admit to copying verbatim, via electronic file transfer, that part of Petitioner's drawings that contained existing conditions and the proposed parking lot modifications. The copied drawings also included Petitioner's name, title block, and notice of copyright. Respondents admit to removing Petitioner's name, title block, and notice of copyright, incorporating the drawings into their own design drawings for the performing arts center, placing their own name and title block upon the drawings, and distributing and displaying those drawings to others.

A panel of the Sixth Circuit Court of Appeals concluded that the contract between Petitioner and Magnificat permitted

Respondents to *use* Petitioner's drawings by copying, adapting, distributing and displaying them as their own. By affirming unchanged the district court's summary judgment disposition in favor of the Respondents, the panel decision also affirmed the finding by the district court that Petitioner had no copyright interest in his drawings.

REASONS FOR GRANTING THE PETITION

I. The Sixth Circuit's Adoption of a Categorical Rule Denying Copyright Protection to Architectural Drawings of Existing Conditions is in Direct Conflict With the Second Circuit's Decision in *Sparaco v. Lawler, Matusky & Skelly Engineers LLP*, 303 F.3d 460 (2nd Cir. 2002)

Following this Court's decision in *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991), the Sixth Circuit has exhibited an antipathy toward recognizing copyrights for technical drawings[1] beginning with *J. Thomas Distributors v. Greenline Distributors*.

> Plaintiff's spindle bearing was *drawn with the express intention of duplicating on paper the appearance of an actual spindle bearing*. Its reproduction involved absolutely no creative spark whatsoever. [...] In essence, the drawing is neither original nor creative. Therefore, copyright law provides it no protection.

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[1] As far back as *Courier Lithographing Co. v. Donaldson Lithographing Co*, in a copyright case involving technology, the Sixth Circuit sustained a directed verdict for the defendant on the ground that chromolithographs were not within the protection of the copyright law; stating "No evidence, aside from the deductions which are to be drawn from the prints themselves, was offered to show that these designs had any original artistic qualities." 104 F. 993, 995 (6th Cir. 1900), *overruled by Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 252 (1903).

100 F.3d 956, 1996 WL 636138 at *2 (6th Cir. 1996) (unpublished) (affirmed the lower court's summary judgment disposition for the defendant) (emphasis added). The Sixth Circuit continued this line of reasoning regarding drawings of a technical nature in *ATC Distrib. Group, Inc. v. Whatever It Takes Transmissions & Parts, Inc.*, citing *J. Thomas Distribs.*, when it again affirmed a district court's grant of summary judgment for the defendants in a copyright case. 402 F.3d 700, 712 (6th Cir. 2005).

The Sixth Circuit did not limit its reasoning to the fact that the drawings at issue in *ATC* were drawn from photographs (and perhaps not copyrightable merely as a copy in another medium), but went on to say that,

> [t]he *illustrations were intended to be as accurate as possible* in reproducing the parts shown in the photographs on which they were based, a form of slavish copying that is the antithesis of originality. *See J. Thomas Distribs.*, 100 F.3d 956, 1996 WL 636138 at *1. [...] "If anything, it moves the illustrations farther into the category of works unprotected by copyright because *they represent nothing but a compilation of facts in a realistic manner.*" *See Sparaco v. Lawler, Matusky & Skelly Eng'rs LLP*, 303 F.3d 460, 462 (2d Cir.2002) (holding that aspects of a site map that simply depict the site as it exists are unprotected by copyright).

402 F.3d 700, 712 (6th Cir. 2005) (emphasis added). The Sixth Circuit's *ATC* decision thus connected technical drawings with factual compilations, and introduced its version of the *Sparaco* decision. The Sixth Circuit's affirmance[2] of

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[2] "The maxim is that silence implies consent, not the opposite-and courts generally behave accordingly, affirming without further discussion when

the district court's reliance in this case on the version of *Sparaco* as cited in *ATC*, further established the circuit's categorical rule denying copyright protection to architectural drawings of existing conditions.

Another circuit is being urged to accept the Sixth Circuit's adopted rule, regarding architectural drawings of existing conditions, to invalidate copyright for other drawings of a technical nature.[3] In *Meshwerks, Inc. v. Toyota Motor Sales U.S.A., Inc.*, the district court relied on *ATC* and *J. Thomas* to deny copyright protection to digital models of Toyota cars.[4] 2006 WL 2623935 at *3 (D. Utah 2006) ("In reaching the conclusion that the hand-drawn illustrations were not entitled to copyright protection, the Sixth Circuit focused on the lack of creative intent...."). Even though the defendants in *Meshwerks* acknowledged that the modeling process used was not entirely mechanical and involved "creative judgments," the court still granted summary judgment in favor of the defendants. *Id.*, at *2.

A. The Second Circuit's *Sparaco* Decision Affirmed the Copyrightability of Site Plans

Despite the district court's citation to *Sparaco* to support its decision, *Grusenmeyer* is in direct conflict with *Sparaco* as to the copyrightability of architectural drawings of existing

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they agree, not when they disagree, with the reasons given below." *Ylst v. Nunnemaker*, 501 U.S. 797, 804 (1991).

[3] Even though *Grusenmeyer* is 'not recommended for full-text publication,' new Fed. R. App. P. 32.1(a) prevents a court of appeals from prohibiting or restricting a party from citing an unpublished opinion of a federal court for its persuasive value.

[4] The case is currently before the Tenth Circuit Court of Appeals, Case No. 06-4222. In briefing, the Appellees have cited to *Grusenmeyer*, *ATC*, and *ATC's* citation of *Sparaco*, in support of the district court's decision.

conditions. The district court in *Grusenmeyer* stated categorically, "[l]ike the site plan in *Sparaco*, Plaintiff's drawings set forth the existing physical characteristics of the facilities at Magnificat and, as such, they set forth facts." (App.D 23a). The district court's analysis in this case ended there, with the recitation of a categorical rule denying copyright to architectural drawings of existing conditions—first erroneously attributed to *Sparaco*[5] as cited in *ATC*, and further established by the Sixth Circuit's affirmance in this case.

The *Sparaco* court, however, did not stop its analysis at the point where the district court did in this case. Sparaco was retained to prepare a "site plan" for the development of an assisted living facility. *Sparaco*, 303 F.3d at 462. The court in *Sparaco* stated that "[t]o the extent that the site plan sets forth the existing physical characteristics of the site, including its shape and dimensions, the grade contours, and the location of existing elements, it sets forth facts; copyright does not bar the copying of such facts." *Id.*, at 467, *citing Feist*, 499 U.S. at 350-351.

The Second Circuit, however, went on to say that the depiction of factual information "does not completely dispose of Sparaco's claim relating to his *representation* of existing factual characteristics of the site." *Sparaco*, 303 F.3d at 467 (emphasis added). As the Second Circuit explained,

> Although a mapmaker is not protected from copying of the factual information *conveyed* in the map, she is protected from the copying of *any originality in the manner of expression* employed in communicating the

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[5] *See* William F. Patry, *1 Patry on Copyright*, § 3:105, n. 5 (2007) (the district court opinion in *Grusenmeyer* "mistakenly relied on the Second Circuit's opinion in a map case, [*Sparaco*]").

> factual information. Without doubt, considerable skill and originality can be exercised by a mapmaker in the setting forth of unprotected information—in the selection or elimination of detail, the size, shape, and density of informative legends, the establishment of conventions relating to color or design to represent topographical or other features, *and many other details of presentation*.

Id. (emphasis added). *Sparaco* also cited favorably to *Mason v. Montgomery Data, Inc.*, for the proposition that copyright protection could be extended to "land survey maps depicting topographical features because they 'possessed sufficient creativity in *both* the selection, coordination, and arrangement of the facts that they depict, *and as in the pictorial, graphic nature of the way that they do so.*'" *Id.*, *citing Mason*, 967 F.2d 135, 142 (5th Cir. 1992) (emphasis added).

Unlike the Second Circuit in *Sparaco*, the Sixth Circuit's affirmance in *Grusenmeyer* does not distinguish between the factual information conveyed by Petitioner's drawings and the pictorial graphic nature of his expression of that factual information.

B. Originality Must Be Determined on a Case By Case Basis Since Categorical Rules Are Disfavored

Together with *Sparaco*, the district court in *Grusenmeyer* relied on *Feist* to support its categorical denial of Petitioner's copyrights. (App.D 21a-24a). *Feist*, however, did not establish a rule denying copyright protection to white pages directories, but rather set the standard of analysis for determining originality in factual compilations, and then found that Rural's white pages failed to meet that minimum standard. *Feist*, 499 U.S. at 362. In order to determine where on the continuum between fact and fancy a work lies,

courts should apply some sort of filtering analysis designed to identify those portions of the work that may be creative expression, rather than dismissing a work out of hand because of the application of some harsh categorical rule. *See Computer Associates v. Altai*, 982 F.2d 693, 707 (2nd Cir. 1992) ("Professor Nimmer suggests, and we endorse, a 'successive filtering method' for separating protectable expression from non-protectable material.").

One copyright treatise has recognized that the district court opinion in *Grusenmeyer* is at odds with most copyright cases involving architectural plans. *1 Patry on Copyright*, § 3:105, n. 5 (2007).[6] Instead of engaging in a fact-based analysis to determine originality in this case, the district court simply applied a categorical legal rule, erroneously derived from *Feist* and *Sparaco*, to support its holding that Petitioner's drawings "do not constitute copyrightable expression." (App.D 23a).

Prior to *Grusenmeyer*, the Sixth Circuit stated that the essential first step in copyright infringement analysis is to "filter out the unoriginal, unprotectible elements—elements that were not independently created by the inventor, and that possess no minimal degree of creativity, [citation omitted]—*through a variety of analyses*."[7] *Kohus v. Mariol*, 328 F.3d 848, 855 (6th Cir. 2003) (emphasis added). In *Kohus*, the Sixth Circuit identified Judge Learned Hand's 'abstractions test' as a helpful "methodological tool courts can use to identify the spectrum of options." *Id.*, *citing Nichols*

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[6] "Issues of originality are not particularly difficult in architectural plan cases." *1 Patry on Copyright*, § 3:105.

[7] Another Sixth Circuit case recognized that *Kohus* established a required two-part test to determine those aspects of the work, if any, that are protectible by copyright. *Stromback v. New Line Cinema*, 384 F.3d 283, 294 (6th Cir. 2004), *citing Kohus*, 328 F.3d at 855.

v. Universal Pictures Corp., 45 F.2d 119, 121 (2nd Cir. 1930). The Sixth Circuit recognized that this Court's opinion in *Feist* also "favors an approach that involves reducing the comparison to elements that are original." *Id.*, at 854.

> Consequently, before comparing similarities between two works a court should first identify and eliminate those elements that are unoriginal and therefore unprotected. This was the method used by the Court in *Feist* [...]. In sum, the Court filtered out the unoriginal, unprotected elements, and then determined that there was nothing original to be protected.

Id., at 853. The Sixth Circuit went on to say that "we do not presume to establish a scheme of abstractions, and we leave that issue for the parties to develop before the district court." *Id.*, at 855.

The Fifth Circuit has said, however, that not all copyright cases require "a rigorous 'abstraction-filtration-comparison' analysis." *Kepner-Tregoe, Inc. v. Leadership Software, Inc.*, 12 F.3d 527, 534 (5th Cir. 1994). But even in *Kepner-Tregoe*, the district court "carefully juxtaposed selections" of the works in question. *Id.* The district court in this case did not disclose any method of analysis that it may have engaged in to determine the unprotectible elements of Petitioner's drawings. Instead of following *Feist* and *Kohus*, the court appears to have relied solely on the Respondents' characterization of the drawings as existing conditions. (App.D 23a).

However, even if the lower courts in this case had reviewed the drawings adequately, the Second Circuit stated in another opinion cited with favor in *Sparaco*, that, "[b]y factoring out similarities based on non-copyrightable elements, a court runs the risk of overlooking *wholesale usurpation* of a prior author's expression. *A* verbatim

reproduction of another work, of course, even in the realm of nonfiction, is actionable as copyright infringement." *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 979-980 (2nd Cir. 1980) (emphasis added), *cert. denied* 449 U.S. 841 (1980). In this case, the *Grusenmeyer* courts did indeed overlook the wholesale usurpation of Petitioner's drawings. Respondents' verbatim reproduction of Petitioner's drawings is actionable as copyright infringement.

As stated in the Supreme Court's decision rejecting a categorical rule involving injunction analysis in patent infringement cases, "traditional equitable principles do not permit such broad classifications." *eBay Inc. v. MercExchange, L.L.C.*, 126 S.Ct. 1837, 1840 (2006). Given the balancing required by the limited monopoly granted authors and the interest of the public in access to works of knowledge, equity also requires that courts engaged in copyright analysis apply some form of filtration on a case by case basis to determine the protectible and unprotectible elements of the work in question.[8] Just as this Court rejected the Federal Circuit's categorical rule in *eBay*, the Court should also reject the Sixth Circuit's categorical rule in this case.

C. Congress Has Declared Uniformity is Essential in the Area of Copyright Law

Congress has declared uniform application of law to be an essential ingredient in the area of copyright by adding § 301 to the Copyright Act of 1976. H.R. Rep. No. 94-1476, 94th

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[8] "A copyright, like a patent, is at once the equivalent given by the public for benefits bestowed by the genius and meditations and skill of individuals, and the incentive to further efforts for the same important objects." *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127-128 (1932), *as cited in eBay*, 126 S.Ct. at 1840.

Cong., 2d Sess. 129 (1976) (§ 301 is "one of the bedrock provisions of the bill").

> By substituting a single Federal system for the present anachronistic, uncertain, impractical, and highly complicated dual system, the bill would greatly improve the operation of the copyright law and would be much more effective in carrying out the basic constitutional aims of uniformity and the promotion of writing and scholarship. The main arguments in favor of a single Federal system can be summarized as follows:
>
> 1. One of the fundamental purposes behind the copyright clause of the Constitution, as shown in Madison's comments in The Federalist, was to promote national uniformity and to avoid the practical difficulties of determining and enforcing an author's rights under the differing laws and in the separate courts of the various States. Today when the methods for dissemination of an author's work are incomparably broader and faster than they were in 1789, national uniformity in copyright protection is even more essential than it was then to carry out the constitutional intent. [...]
>
> 4. Adoption of a uniform national copyright system would greatly improve international dealings in copyrighted material. No other country has anything like our present dual system. In an era when copyrighted works can be disseminated instantaneously to every country on the globe, the need for effective international copyright relations, and the concomitant need for national uniformity, assume ever greater importance.

Id., at 129-130. A categorical rule denying copyright protection to works expressly included in the copyright statute should not have been adopted, in light of the Copyright Act's stated purpose of creating a single uniform system.

II. The Sixth Circuit's Affirmance in *Grusenmeyer v. DSC*, 212 Fed. Appx. 510, (6th Cir. 2007) is in Conflict With the Copyright Act of 1976 and Decisions of the Supreme Court

A. The Copyright That Subsists in Architectural Plans Is Independent of the Copyright in Any Architectural Work Within Those Plans

Following passage of the Architectural Works Copyright Protection Act ("AWCPA"), "two separate forms of protection exist, one for architectural plans and the other for structures based on such plans." Melville B. Nimmer and David Nimmer, *1 Nimmer on Copyright*, § 2.08[D][2][a] n. 163.4. "Either or both of these copyrights may be infringed and eligible separately for damages." H.R. Rep. No. 101-735, 101st Cong., 2d Sess. 19 (1990). However, nothing in the AWCPA affects protection for "architectural plans, drawings, and models as pictorial, graphic or sculptural works...." *Id.*; AWCPA, Pub.L. No. 101-650, §§ 701-706 (1990).

The Copyright Act includes 'architectural *plans*' in the definition of "pictorial, graphic, and sculptural works." 17 U.S.C. § 101. An 'architectural *work*,' on the other hand,

> is the *design* of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings. The work includes the overall form as well as the arrangement and composition of spaces and elements in the design, but does not include individual standard features.

Id. (in part) (emphasis added).[9] Practically speaking, there are actually three forms of copyright protection available for most architectural plans; a copyright exists in the *drawing* itself (as a technical drawing), in any original *design* of a new or proposed building that may or may not be depicted in the drawing, and in any *structure* built from that original design. If a structure is never built, copyright still exists for the drawing and design. If no original design is present, copyright still exists for the drawing, as long as the drawing itself meets constitutional standards of originality.

Petitioner registered his drawings as both architectural works and technical drawings. Petitioner's copyrights inhered in both the drawings themselves (as technical drawings), and in his original design for the proposed performing arts center and parking lot modifications. No distinction is made in the Copyright Act as to different types of architectural plans or technical drawings, nor do the drawings at issue fit the definition of "compilation," as defined by § 101. Therefore, as long as the works at issue meet the constitutional requirement of originality, the works are copyrightable.

The district court decision in this case hints at recognizing the difference between the *drawing* and the *design*.

> Like the site plan in *Sparaco*, Plaintiff's drawings set forth the existing physical characteristics of the facilities at Magnificat and, as such, they set forth facts. The Court finds that Plaintiff's decisions as to design details are *not sufficiently unique* so as to render the drawings protected.

(App.D 23a) (emphasis added). However, nothing in the Copyright Act of 1976, or the amendments added by the

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[9] Copyright Office regulations require a separate registration for architectural works. 37 C.F.R. § 202.1(c)(4).

AWCPA, establishes a requirement of novelty, or *uniqueness*, as a prerequisite to copyright protection for architectural works. "Originality does not signify novelty; a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying." *Feist*, 499 U.S. at 345.

B. Technical Drawings are Not Factual Compilations

In *Grusenmeyer*, the categorical rule adopted by the lower courts seems to be based upon an assumption that a pictorial expression of factual information is merely a collection of facts. A pictorial expression of factual information, however, is just that—an expression. It is not a compilation of the facts themselves, such as a telephone directory. If the same assumption were applied to maps, photographs, and other technical drawings, they would also be denied copyright protection merely because they happen to *convey* factual information.

Technical drawings are included in the definition of "pictorial, graphic, and sculptural works" in § 101 of the Copyright Act.[10] "A 'compilation' is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship." 17 U.S.C. § 101 (in part). Based on the definition of 'compilation' provided in the Copyright Act, technical drawings are not *per se* compilations. Some technical drawings may indeed be compilations of existing

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[10] "'Pictorial, graphic, and sculptural works' include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans." 17 U.S.C. § 101 (in part).

drawings, but the mere fact that a technical drawing is *based* in fact does not make it a compilation.

While not defined in the Copyright Act, the Supreme Court explained that 'facts' in copyright law are equivalent to the 'discoveries' mentioned as unprotectible in § 102(b). *Feist*, 499 U.S. at 356 (*citing 1 Nimmer on Copyright*, § 2.03[E]). A 'fact' exists whether it has been discovered or not, and as such, does not owe its existence to the discoverer. On the contrary, drawings, whether based in fact or pure fancy, do not, and can not, exist without their creator. In *Burrow-Giles Lithographic Co. v. Sarony*, the Court defined "author" to mean "he to whom anything owes its origin...." 111 U.S. 53, 57-58 (1884); *Feist*, 499 U.S. at 346. Drawings, whether technical or not, undoubtedly have an author as defined in a constitutional sense, and therefore do no meet the definition of 'fact' as expressed by this Court.

In *Feist*, Rural's white pages listings of names, addresses and telephone numbers were themselves facts. *See Feist*, 499 U.S. at 349 ("Where the compilation author adds no written expression but rather lets the facts speak for themselves, the expressive element is more elusive. The only conceivable expression is the manner in which the compiler has selected and arranged the facts."). In this case, Petitioner's drawings are two-dimensional abstract pictures that are his representational expressions of the campus at Magnificat, similar to an artist's graphical expression of an existing landscape, or a mapmaker's depiction of geographical area. Since it is the pictorial or graphic form of the drawings that is copyrightable, and not the information conveyed, Petitioner's drawings are thus legally different from non-pictorial compilations of fact such as Rural's alphabetical telephone listings.

Unlike factual compilations, existing conditions drawings, like other technical drawings, transform the subject matter

contained therein into pictorial and graphic form. Since it is this pictorial or graphic form that is relevant to copyright protection, and not the drawing's subject matter, technical drawings are distinguished from factual compilations. Unlike the phone numbers in *Feist*, the drawing is not itself the fact, but rather the author's pictorial expression, involving a myriad of individual creative choices. It is this unique spark of human creativity that elevates the drawing above a mere mechanical reproduction of existing factual information. The translation from three-dimensional reality to two-dimensional pictorial representation involves that spark of human intellectual expression that is the very essence of copyright originality.

The Supreme Court's decisions in *Burrow-Giles* and *Bleistein* long ago refuted any basis for viewing technical drawings merely as factual compilations. The Court rejected the argument put forth by the defendant in *Burrow-Giles*—that the photograph should not be protected because it was a "mere mechanical reproduction," representing "some existing object, the accuracy of this representation being its highest merit." *Burrow-Giles*, 111 U.S. at 59. The Court ruled that the photograph in question, "Oscar Wilde, No. 18," was "the product of plaintiff's intellectual invention, of which plaintiff is the author" and was not to be distinguished from the "class of inventions for which the constitution intended that congress should secure to him the exclusive right to use, publish, and sell...." *Id.*, at 60. As stated by Judge Learned Hand in the district court decision in *Jewelers' Circular*, the Supreme Court went on to hold in *Bleistein* that, "no photograph, however simple, can be unaffected by the personal influence of the author, and no two will be absolutely alike." *Jewelers' Circular Pub. Co. v. Keystone Pub. Co.*, 274 F. 932, 934 (S.D.N.Y. 1921), *referencing Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903). "The least

pretentious picture has more originality in it than directories and the like, which may be copyrighted." *Bleistein*, 188 U.S. at 250. As Justice Holmes said in *Bleistein*, "It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits." 188 U.S. at 251.

Notwithstanding that Petitioner's drawings are pictorial expressions of factual information (at least as to that portion depicting existing conditions), and not facts themselves, this Court affirmed in *Feist* that "even a directory that contains *absolutely no protectible written expression, only facts*, meets the constitutional minimum for copyright protection if it features an original selection or arrangement." *Feist*, 499 U.S. at 348 (emphasis added). With regard to maps, "[t]he selection and arrangement of public domain materials will generally in itself constitute originality necessary to support a copyright." *1 Nimmer on Copyright*, § 2.08[A][3][a]; *Rockford Map Pub., Inc. v. Directory Serv. Co., of Colo.*, 768 F.2d 145 (7th Cir. 1985), *cert. denied* 474 U.S. 1061 (1986).

In the realm of nonfiction works, "[a] verbatim reproduction of another work, of course, ...is actionable as copyright infringement." *Hoehling*, 618 F.2d at 979-980; *see also SHL Imaging, Inc. v. Artisan House, Inc.*, 117 F. Supp. 2d 301, 311 (S.D.N.Y. 2000) (court upheld plaintiff's copyright in its photographs of defendant's picture frames, stating "[p]ractically, the plaintiff's works are only protected from verbatim copying. However, that is precisely what defendants did."). The Respondents in this case did not extract factual information from Petitioner's drawings, but rather copied them verbatim. Therefore, even if Petitioner's drawings are subject only to a 'thin' copyright, Respondents infringed when they copied the drawings verbatim.

C. The Sixth Circuit's Adoption of a Categorical Rule Does Not Recognize the Fact/Expression Dichotomy

"[C]opyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work. [citation omitted] This principle, known as the idea/expression or fact/expression dichotomy, applies to all works of authorship." *Feist*, 499 U.S. at 349-350. The distinction between facts and their expression is crucial to a proper understanding of copyright protection for maps and architectural drawings such as Petitioner's AutoCAD® drawings of the campus at Magnificat. The idea or fact/expression divide "distinguishes the original work's protectable elements from its unprotectable ones, a distinction that allows courts to determine whether any of the former have been copied in substantial enough part to constitute infringement." *Lexmark Int'l., Inc. v. Static Control Components, Inc.*, 387 F3d. 522, 538 (6th Cir. 2004).

Instead of using the fact/expression distinction to filter out any unprotectible elements of Petitioner's drawings, the Sixth Circuit affirmed the district court's application of a categorical rule that architectural drawings of existing conditions are not copyrightable. However, if applied elsewhere, the Sixth Circuit's rule would invalidate copyright protection for most maps, which have long been recognized as copyrightable expression. *United States v. Hamilton*, 583 F.2d 448, 451-452 (9th Cir. 1978) ("That maps have sufficient originality to support a copyright has been recognized since the first copyright statute, enacted in 1790.").

In drawings of a technical nature, the drawing is itself the expression of the underlying factual information, just like the biographer's precise sequence of words used to convey the

factual information regarding her subject.[11] One could even argue that since such drawings can not protect the underlying factual information, protection for the expressive element—the drawing as a pictorial work—is all the more important.[12] Although interesting in theory, Petitioner is not proposing that anything other than traditional originality analysis be applied in this case. *See Hamilton*, 583 F.2d at 451 ("Expression in cartography is not so different from other artistic forms seeking to touch upon external realities that unique rules are needed to judge whether the authorship is original.").

The Fifth Circuit in *Mason*, distinguishing facts/ideas from their expression as it relates to maps, stated that even though Mason sought to depict the information accurately, "the evidence in this case demonstrates that Mason exercised sufficient creativity when he created his maps. In his deposition and affidavit, Mason explained the choices that he independently made to select information from numerous and sometimes conflicting sources, and to depict that information on his maps." 967 F.2d at 141. The court went on to hold that Mason's maps "involved creativity that *far exceeds* the required minimum level." *Id.*, at 141-142 (emphasis added).

Like *Mason*, Petitioner explained in his deposition and affidavit the choices that he independently made to select information from numerous and sometimes conflicting sources. (App.F 32a). Petitioner also made choices as to the level of detail to depict and the scale and amount of information shown. (App.F 32a-33a). Petitioner also

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[11] *See Harper & Row, Publrs. v. Nation Enters.*, 471 U.S. 539, 563 (1985).

[12] *See Feist*, 499 U.S. at 350 ("This Court has long recognized that the fact/expression dichotomy limits severely the scope of protection in fact-based works.").

designed modifications to the Magnificat parking lot depicted in the AutoCAD® drawings copied by the Respondents. (App.F 33a). Further, the architectural symbols used in Petitioner's drawings were his own creation. (App.F 32a). These key points distinguish Petitioner's copyrightable expression from any underlying facts contained therein, notwithstanding the fact that a drawing is, by its very nature, an expression and not a fact.

III. State Law Contracts Involving Copyrightable Subject Matter Must Be Interpreted With Deference to the Copyright Act of 1976

A. Complete Preemption Doctrine

The Copyright Act of 1976 preempts state law and controls contract claims involving copyrightable subject matter. 17 U.S.C. § 301(a); *Ritchie v. Williams*, 395 F.3d 283, 286-288 (6th Cir. 2005).

> The intention of section 301 is to preempt and abolish any rights under the common law or statutes of a State that are equivalent to copyright and that extend to works coming within the scope of the Federal copyright law. The declaration of this principle in section 301 is intended to be stated in the clearest and most unequivocal language possible, so as to foreclose any conceivable misinterpretation of its unqualified intention that Congress shall act preemptively, and to avoid the development of any vague borderline areas between State and Federal protection. [...]
>
> As long as a work fits within one of the general subject matter categories of sections 102 and 103, the bill prevents the States from protecting it even if it fails to achieve Federal statutory copyright because it

> is too minimal or lacking in originality to qualify, or because it has fallen into the public domain.

H.R. Rep. No. 94-1476, 130-131. Before applying state contract law "to the copyright arena, its particular application must be evaluated for consistency with the overarching federal scheme." *See 3 Nimmer on Copyright*, § 10.03[A][8] ("[T]he pertinent inquiry should take place under state law only to the extent that state law itself 'does not conflict with the Copyright Act'"), *citing Foad Consulting Group, Inc. v. Azzalino*, 270 F.3d 821, 827 (9th Cir. 2001).

As a threshold matter, any reputed source of permitted uses of a work within the subject matter of copyright should be examined to see if the permitted use is within the limits imposed by the Copyright Act. For instance, the Copyright Act states that "[o]wnership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, [...] in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object... ." 17 U.S.C. § 202 (in part). The stringent writing requirements dictated by § 204(a) of the Copyright Act further reiterates the Congressional intent to avoid inadvertent transfer of an author's copyrights.

The Eleventh Circuit has stated that "the chief purpose of section 204(a) ... is to resolve disputes between copyright owners and transferees and to protect copyright holders from persons mistakenly or fraudulently claiming oral licenses or copyright ownership." *Imperial Residential Design, Inc. v. Palms Dev. Group, Inc.*, 70 F.3d 96, 99 (11th Cir. 1995). Barring a writing that actually transfers ownership of any of Petitioner's exclusive copyrights, any use allowed by Petitioner's contract with Magnificat is limited only to use of the physical object produced under the contract—unless

Petitioner granted a nonexclusive license directly to Respondents.[13]

The Sixth Circuit panel in *Grusenmeyer* adopted the district court's language about the scope of any license that may, or may not have been, granted to Respondents under the contract with Magnificat.

> We agree with the district court's conclusion that, contrary to the plaintiff's assertions, the contract permits the use, *as described*, of the materials developed under it.

(App.C 13a) (emphasis added). The relevant language in the contract reads: "Provide a master plan for the implementation of the capital improvements program, including plans, renderings, and perspectives suitable for use *in presentation and future reference* during master plan implementation." (App.C 7a) (emphasis added). The use, *as described*, to which Respondents admit, includes copying Petitioner's drawings verbatim, replacing Petitioner's name and notice of copyright with their own, preparing derivative works from the drawings, and distributing and displaying those works to others.

The Sixth Circuit recognized the Copyright Act's complete federal preemption over state law claims involving copyrightable subject matter. *Ritchie*, 395 F.3d at 286-288. In light of the Congressional mandate in § 301, federal courts are required to view all contracts involving copyrightable subject matter through the prism of the Copyright Act. A

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[13] "[W]e note that there is a narrow exception to the writing requirement that may apply here. Section 204 provides that all transfers of copyright ownership must be in writing; section 101 defines transfers of ownership broadly, but expressly removes from the scope of section 204 a 'nonexclusive license.'" *Effects Assoc., Inc. v. Cohen*, 908 F.2d 555, 558 (9th Cir. 1990).

court can not apply an expansive interpretation of the phrase "suitable for use in presentation and future reference," in a state law contract, irrespective of the mutually exclusive nature of the rights of copyright. 17 U.S.C. § 106. A contractual license to one right does not convey a license to any other right.

B. Copyright Rights Are Mutually Exclusive

The contract between Petitioner and Magnificat was intended to *protect* Petitioner's copyrights, not give them away. Payment for the extensive 'master planning services,' and the subsequently delivered printed copies of the Master Plan, only entitled Magnificat to display Petitioner's work for the limited period described, and to ownership of those particular printed copies and use of the factual information contained therein—no more. 17 U.S.C. § 202 (transfer of the material object does not convey any rights in the copyrighted work embodied in the object).

Even though the district court and the Sixth Circuit panel assumed that the infringed electronic AutoCAD® drawings "would be necessary for the implementation of the capital improvements program and would therefore be included within Plaintiff's responsibilities under the contract,"[14] the contract did not transfer ownership of Petitioner's copyrights in them. 17 U.S.C. § 204(a) (requiring any transfer of rights to be in writing). "'No magic words must be included in a document to satisfy § 204(a).' It must, however, show *an agreement to transfer copyright*." *Lyrick Studios, Inc. v. Big Idea Productions, Inc.*, 420 F.3d 388, 392 (5th Cir. 2005) (emphasis added), *citing Television Espanola S.A. v. New World Entertainment, Ltd.*, 183 F.3d 922, 927 (9th Cir. 1999). "Transfer of the physical object does not transfer

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[14] District Court Opinion (App.D 27a); Sixth Circuit Opinion (App.C 13a).

statutory copyright. To the extent that a writing is ambiguous as to whether it refers to copyright or physical interest, it could fail to transfer copyright ownership." *3 Nimmer on Copyright* § 10.03[A][3].

What the contract did provide was for Magnificat, not the Respondents, to receive "plans, renderings, and perspectives suitable for use in presentation and future reference...." (App.C 7a). Petitioner has made no claim that the factual information conveyed by his works belongs to him. He recognized the need for Magnificat High School to use that *information* by specifically providing for its use in the contract with Magnificat.[15] Beyond the extraction of factual information, however, § 106 of the Copyright Act enumerates the mutually exclusive rights of copyright.

The only one of the exclusive rights of copyright to which Magnificat may have received a license, is that of 'display.' To grant a license for one § 106 right, does not grant a license for any other. The right of display is distinct from the right of reproduction. 17 U.S.C. § 106. Granting permission to 'present' does not grant a license to copy, adapt, or distribute. Further, such presentation (or display), would have to be of Petitioner's work, not of Respondents' infringing adaptation or copy of that work. Left undisturbed, the Sixth Circuit's opinion limits the scope of the Copyright Act's complete preemption, as expressed by Congress in § 301.

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[15] "A copyright in architectural plans does not, of course, preclude one in authorized possession of such plans (even if he is not an assignee or licensee under the copyright) from consulting the plans to determine measurements or other data contained in such plans." *1 Nimmer on Copyright*, § 2.08[D][2][a] n.169; *see Demetriades v. Kaufmann*, 680 F.Supp. 658, 663 (S.D.N.Y. 1988).

C. This Decision Creates Needless Uncertainty for Architects, Mapmakers, and Other Technical Artists

This decision is of importance to all architects who have relied upon the time-tested provisions of standard AIA Forms of Agreement to protect their copyright interests, and unnecessarily increases the likelihood of future litigation. The decision should also be of concern to surveyors and mapmakers whose work is intended to portray 'existing conditions' and thus may be subject to the erosion of their statutorily protected copyrights.

The Sixth Circuit panel interpreted Article 6.1 of the AIA document[16] as allowing the Respondents (not a party to the contract), to copy, adapt, distribute, and display Petitioner's copyrighted work. (App.C 11a-12a). Article 6.1 states:

> The Drawings, Specification and other documents prepared by the Architect for this Project are instruments of the Architect's service for use solely with respect to this Project, and the Architect shall be deemed the author of these documents and shall retain all common law, statutory and other reserved rights, including the copyright. The Owner shall be permitted to retain copies, including reproducible copies, of the Architect's Drawings, Specifications and other documents for information and reference in connection with the Owner's use and occupancy of the Project. The Architect's Drawings, Specifications or other documents shall not be used by the Owner or others on other projects, for additions to this Project or for completion of this Project by others, unless the Architect is adjudged to be in default under this

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[16] American Institute of Architects Document B151: Abbreviated Form of Agreement Between Owner and Architect, 1987 Edition.

> Agreement, except by agreement in writing and with appropriate compensation to the Architect.

(App.C 11a) (in entirety). This same contractual provision has been interpreted before by the Sixth Circuit in *Johnson v. Jones*, 149 F.3d 494, 498 (6th Cir. 1998).[17]

The *Johnson* case involved "...the way in which Johnson's drawings were used. It is one thing for an architect to allow the owner to hire someone else to build a house from the architect's plans. It is quite another for the architect to allow a competitor to come in and claim the architect's work as his own." *Johnson*, 149 F.3d at 501. Notwithstanding the panel's attempt to distinguish *Johnson* as only precedential on the issue of intent,[18] the *Johnson* court *did interpret* Article 6.1 of AIA Document B151, deeming it a key factor in reaching its decision. *Id.*, 149 F.3d at 500.

In *Johnson*, the Sixth Circuit held that Article 6.1 prohibited the transfer of copyright, *or the grant of any license*, without a separate writing and "*additional* compensation." *Id.* (emphasis added). In sharp contrast with the *Johnson* panel, the *Grusenmeyer* panel concluded that the payment for master planning services in the *same* contract *containing* Article 6.1 is sufficient to satisfy the writing and compensation requirement expressed in Article 6.1. (App.C 12a). To accept the court's new interpretation of Article 6.1, all the preceding sentences in Article 6.1 regarding copyright ownership would become meaningless.

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[17] *Johnson*, 149 F.3d at 500 ("every objective fact ...points away from the existence of an implied license"), *as cited in 3 Nimmer on Copyright*, § 10.03[A][7] n. 69.

[18] "In *Johnson*, we were not called upon to interpret a written contract but to determine the intentions of an architect and his client who had never reduced their agreement to writing." (App.C 14a) (emphasis original).

Applying state contract law, the Supreme Court of Ohio has said:

> In the construction of a contract, courts should give effect, if possible, to every provision therein contained, and if one construction of a doubtful condition written in a contract would make that condition meaningless, and it is possible to give it another construction that would give it meaning and purpose, then the latter construction must obtain.

Foster Wheeler Enviresponse v. Franklin County Convention Facilities Auth., 678 N.E.2d 519, 526 (Ohio 1997); *see also Gomolka v. State Auto. Mut. Ins. Co.*, 436 N.E.2d 1347, 1351 (Ohio 1982) ("One may not regard only the right hand which giveth, if the left hand also taketh away. The intention of the parties must be derived instead from the instrument as a whole, and not from detached or isolated parts thereof.").

The change in the Sixth Circuit's interpretation of Article 6.1 (from *Johnson* to *Grusenmeyer*), would mean that an architect would only receive the benefit of the prohibitions in Article 6.1 if he *doesn't* sign the contract. Likewise, according to the panel opinion, if an architect signs the contract and is paid for his services, he gives up the very thing the contract expressly attempts to preserve. The only proper construction of Article 6.1 in the contract between Petitioner and Magnificat is that found by the court in *Johnson*; that *additional* agreement and compensation is necessary for others to use Petitioner's work. Such an interpretation is also in accordance with the federal copyright statute. *Gardner v. Nike, Inc.*, 279 F.3d 774, 781 (9th Cir. 2002) ("Requiring the licensee to get explicit consent from the licensor strikes the balance between the competing interests that underlie the 1976 Act and copyright law in general.").

The Sixth Circuit's *Grusenmeyer* decision casts doubt on the independent legal significance of the American Institute of Architects' standard contract documents to prevent transfer of an architect's copyright interests. In the future, architects will be unable to rely on the time tested provisions of the AIA contract. Any argument put forth by the Respondents that they are permitted by the contract to copy, adapt, distribute and display Petitioner's work as their own, simply does not pass the "smell test, [...] given the fact that every AIA contract contains provisions about copyright ownership." *Johnson*, 149 F.3d at 504. Indeed, Respondents relied on the same AIA provision to preserve their copyrights in their drawings when they negotiated their own contract with Magnificat.

The New Hampshire district court listed several cases, including *Johnson*, which interpreted the presence of the AIA contract as preclusive to finding that defendants had a license to copy the works in question. *Meisner Brem Corp. v. Mitchell*, 313 F.Supp.2d 13, 19 (D.N.H. 2004), *citing John G. Danielson, Inc. v. Winchester-Conant Prop., Inc.*, 322 F.3d 26, 41 (1st Cir. 2003) ("architect and client signed standard AIA contract providing that the plans 'shall not be used ... for other projects, for additions to this Project, or for completion of this Project by others ... except by agreement in writing and with appropriate compensation'"), *Nelson-Salabes, Inc. v. Morningside Dev., LLC*, 284 F.3d 505, 516 (4th Cir. 2002) ("plaintiff architectural firm submitted contracts to client that contained standard AIA prohibition against use of its drawings without the plaintiff's future involvement or consent"), *and Johnson*, 149 F.3d at 498-500 ("AIA contracts provided by architect showed intent not to grant license for use of the architect's work by others without express permission").

To accept the Sixth Circuit's new interpretation of Article 6.1 would mean that every architect who used the same AIA contract has surrendered his copyrights in drawings produced in accordance with that contract, since virtually all architectural drawings are to be 'suitable for use' and are paid for. If the lower court's interpretation of this contract is allowed to stand, then no architect will be able to rely on the time tested provisions of the AIA contract to preserve his copyright interests, and the purpose of §§ 106, 202, 204, and 301 of the Copyright Act are defeated.

CONCLUSION

This decision involves the future ability of architects, surveyors, and mapmakers to rely on contractual reservations of their copyrights and the protection of the Copyright Act of 1976, together with a proper application of the Supreme Court's decision in *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991) by the federal courts. For all the foregoing reasons, the petition should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

06-3293

[Filed July 3, 2007]

JEFFREY A. GRUSENMEYER & ASSOCIATES, INC., Plaintiff-Appellant,	)
v.	)
DAVISON, SMITH & CERTO ARCHITECTS, INC.; WILLIAM A. DAVISON; RANDALL S. SMITH; and JEFFREY M. CERTO, Defendants-Appellees.	)

MANDATE

Pursuant to the court's disposition that was filed 1/8/07 the mandate for this case hereby issues today. Affirmed

COSTS: NONE

Filing Fee . . . . . $
Printing . . . . . $

Total . . . . . $

A True Copy

Attest:

/s/_____
Deputy Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

06-3293

[Filed May 1, 2007]

JEFFREY A. GRUSENMEYER & ASSOCIATES, INC., Plaintiff-Appellant,

v.

DAVISON, SMITH & CERTO ARCHITECTS, INC. ET AL., Defendants-Appellees.

BEFORE: DAUGHTREY and MCKEAGUE, Circuit Judges; and REAVES,* District Judge

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

* Hon. Danny C. Reeves, United States District Judge for the Eastern District of Kentucky, sitting by designation.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/_____

Leonard Green, Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

06-3293

[Filed January 8, 2007]

JEFFREY A. GRUSENMEYER & ASSOCIATES, INC., Plaintiff-Appellant,	)
v.	)
DAVISON, SMITH & CERTO ARCHITECTS, INC.; WILLIAM R. DAVISON; RANDALL S. SMITH; and JEFFREY M. CERTO, Defendants-Appellees.	)

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

JUDGES: Before: DAUGHTREY and McKEAGUE, Circuit Judges, and REEVES, * District Judge.

* The Hon. Danny C. Reeves, United States District Judge for the Eastern District of Kentucky, sitting by designation.

OPINION

PER CURIAM. In this action for copyright infringement, plaintiff Jeffrey A. Grusenmeyer & Associates, Inc. (Grusenmeyer), an architectural firm, appeals from the district court's grant of summary judgment to defendant Davis, Smith & Certo Architects, Inc., and to its principals, William R. Davison, Randall S. Smith, and Jeffrey M. Certo (collectively, DSC Architects). Grusenmeyer also challenges the district court's denial of its own motion for summary judgment, contending that although the architectural drawings at issue merely documented existing conditions, they were sufficiently original to merit copyright protection; that the defendants were not licensed to use these drawings; that the defendants' use of the drawings was not permitted by the fair use doctrine; and that the individual defendants are subject to vicarious liability for the infringement. The district court held that the drawings were not sufficiently original to be protected by copyright and that, in any event, the defendants were entitled to their use under the terms of the plaintiff's contract with a third party. Because we conclude that the district court correctly determined that the defendants' use was permitted by contract, we affirm the court's grant of summary judgment to the defendants.

I. FACTUAL AND PROCEDURAL BACKGROUND

The record indicates that this case arose from a "request for proposal" from Magnificat High School for the development of a master plan to expand the school. Several architectural firms responded to the request, and Grusenmeyer was selected for the project. The owner of the Grusenmeyer firm, Jeffrey Grusenmeyer, subsequently drafted a two-page letter agreement setting out the details of a "proposed master

plan and facilities study." Sister Carolyn Marshall, the high school's president, signed the agreement for Magnificat.

The contract provided that Grusenmeyer would: (1) "[r]eview the existing facility's conditions" and make maintenance and improvement recommendations accordingly, (2) "[r]eview and develop a program for capital improvements," and (3) "[p]rovide a master plan for the implementation of the capital improvements program, including plans, renderings, and perspectives suitable *for use in presentation and future reference during master plan implementation.*" (Emphasis added.) Magnificat agreed to provide Grusenmeyer with "[o]riginal drawings of the building and site" and to pay a fee based on hourly rates, "not [to] exceed $15,000, with the first $2,000 of architectural services provided on a donated basis."

In developing the master plan, Grusenmeyer prepared a new set of drawings of the existing conditions of the property using a computer program. The resulting computer files combined information taken from the existing drawings and blueprints that Magnificat had provided to Grusenmeyer and the firm's own field measurements. Grusenmeyer registered these renderings with the U.S. Copyright Office, both as an "architectural work" and as a "technical drawing."

Jeffrey Grusenmeyer testified that these drawings and files were created "[s]eparate and apart from the requirements of th[e] contract," with the hope that Grusenmeyer "would later be the successful bidder to design the performing arts center." Although Jeffrey Grusenmeyer insisted that the electronic drawings were made for personal use and not for Magnificat, he also conceded that Magnificat "paid for portions of the services [used] in...creating [them]" and acknowledged that he had later given a copy of the electronic files to Don Koma,

Magnificat's facility director, purportedly for Koma's "personal use." Counsel for Grusenmeyer was asked at oral argument on appeal whether the electronic files in question were attached to the master plan that was turned over to Magnificat. He indicated that he could not say with certainty one way or the other, but the district court explicitly found that it was "undisputed that Plaintiff provided Magnificat with existing conditions drawings."

After Grusenmeyer completed the master plan for the expansion project, Magnificat sent out another "request for proposal," this time for the development of the performing arts building anticipated, but not fleshed out, by the master plan. Grusenmeyer submitted a proposal for this project, but it was awarded to another bidder, defendant DSC Architects. Marshall then provided DSC Architects with existing drawings of the site in a variety of forms, just as she had Grusenmeyer. The electronic files with the disputed drawings were also among the materials supplied to DSC Architects, in response to its standard request for copies of existing documentation of "built conditions." According to Marshall, it was accepted protocol for the school to provide this background information about existing structures once a project had been awarded.

DSC Architects referred to these materials in developing its plans for the performing arts center and later acknowledged that the drawings it developed to show the location of its proposed construction contained content from the files created by Grusenmeyer, including portions of the electronic drawings at issue here, which were inserted into the defendants' own electronic drawings. DSC Architects also did its own field work to supplement these drawings, in some cases correcting inaccuracies on the electronic files, and it

referenced supplemental materials, including other extant drawings of existing conditions provided by the school.

According to the individual DSC architects, such reliance on drawings of existing conditions created by others is routine in the industry. For example, Certo, the firm's secretary, testified that although he knew that these files had been created by Grusenmeyer, he had no hesitation about using them because such use is "a common practice." He testified that "[f]iles are exchanged in the profession routinely when work is being added to a facility, revised in a facility, [or] renovated" and that it is accepted practice to do so without first seeking permission where the drawings utilized merely document existing conditions. Davison echoed this view, adding that he had often provided other architects with background drawings that he had created for use in their own projects. He also remarked that before computer files were used to create drawings, architects would simply trace existing drawings.

The district court granted summary judgment to the defendants and denied summary judgment to the plaintiff, finding that the drawings in question were not sufficiently unique to merit copyright protection and, alternatively, that their use was authorized under the contract between Grusenmeyer and Magnificat. Because the court found that the contract was unambiguous as a matter of law, it declined to take into consideration Jeffrey Grusenmeyer's testimony concerning his understanding of its terms. Grusenmeyer now appeals that determination.

II. DISCUSSION

We review a district court's grant or denial of summary judgment *de novo*. *See Thomas v. Cohen*, 453 F.3d 657, 660

(6th Cir. 2006). Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). A genuine issue of material fact exists when, "view[ing] the factual evidence and draw[ing] all reasonable inferences in favor of" the nonmoving party, sufficient evidence exists for a trier of fact to find for that party. *Summers v. Leis,* 368 F.3d 881, 885 (6th Cir. 2004) (citation omitted). However, introducing a "mere scintilla of evidence is insufficient" to withstand summary judgment, *id.*, and "[t]he nonmoving party may not rest on his pleadings, but must come forward with evidence from which a rational trier of fact could find in his favor," *Bridgeport Music, Inc. v. Rhyme Syndicate Music,* 376 F.3d 615, 621 (6th Cir. 2004) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)).

Where a party has used copyrighted material with permission, a finding of infringement is precluded. *See Johnson v. Jones,* 149 F.3d 494, 500 (6th Cir. 1998). The defendants argued, and the district court agreed, that notwithstanding any otherwise valid copyright protection, the contract between Grusenmeyer and Magnificat permitted DSC Architects to use the drawings. More precisely, the defendants argued that Grusenmeyer's agreement to "[p]rovide a master plan for the implementation of the capital improvements program, including plans, renderings, and perspectives suitable for use in presentation and future reference during master plan implementation" permitted the use of the drawings at issue here, insofar as the defendants undertook to implement the master plan.

Grusenmeyer argues on appeal that in adopting the defendants' theory of the contract's coverage, the district court overlooked the provision that Grusenmeyer's services would be rendered in accordance with American Institute of Architect's "Abbreviated Form of Agreement Between Owner and Architect." Although Jeffrey Grusenmeyer conceded that the form agreement was not appended to the actual contract or otherwise supplied to Magnificat, he relied on Section 6.1 of AIA's form agreement to establish his exclusive retention of rights in the disputed drawings. That section of the form agreement provides:

> The Drawings, Specifications and other documents prepared by the Architect for this Project are instruments of the Architect's service for use solely with respect to this Project, and the Architect shall be deemed the author of these documents and shall retain all common law, statutory and other reserved rights, including the copyright. The Owner shall be permitted to retain copies, including reproducible copies, of the Architect's Drawings, Specifications and other documents for information and reference in connection with the Owner's use and occupancy of the Project. The Architect's Drawings, Specifications or other documents shall not be used by the Owner or others on other projects, for additions to this Project or for completion of this Project by others...except by agreement in writing and with appropriate compensation to the Architect.

The district court rejected the plaintiff's interpretation of the provision. Looking to the final sentence, the court

emphasized the fact that Section 6.1 permitted "others, such as Defendants, [to] use Plaintiff's work if agreed to in writing and accompanied by appropriate compensation." Having found that the record established both a written agreement between Grusenmeyer and Magnificat and appropriate compensation running to the former from the latter, the district court held that the AIA provision buttressed the defendants' motion for summary judgment rather than the plaintiff's.

We agree with this interpretation and with the district court's substantive ruling on the effect of the explicit contractual provisions, the "plain language" of which the court said

> called for Plaintiff to prepare a master plan "for the implementation of the capital improvements program, including plans, renderings and perspectives suitable for use in the presentation and future reference during master plan implementation." As provided in the contract, the program for capital improvements included the building of a "Fine Arts/Band Practice/Auditorium type space[]." It is undisputed that Plaintiff provided Magnificat with existing conditions drawings, and that those drawings were used in connection with the development of the Performing Arts Center at Magnificat. As such, the existing conditions drawings fall within the scope of Plaintiff's responsibilities under the contract, for which Magnificat paid Plaintiff approximately $15,000.

> It is consistent with logic that drawings of existing conditions would be necessary for the implementation of the capital improvements program and would therefore be included within Plaintiff's responsibilities under the contract. Equally logical is the fact that such drawings may be used in the implementation, in return for the compensation that Magnificat paid to Plaintiff.

We agree with the district court's conclusion that, contrary to the plaintiff's assertions, the contract permits the use, as described, of the materials developed under it. Otherwise, the contract provision stating that Grusenmeyer would "[p]rovide...plans, renderings, and perspectives suitable for use and future reference during master plan implementation" would be meaningless.

We find Grusenmeyer's remaining arguments concerning the meaning and scope of its contract with Magnificat equally unavailing. The plaintiff argues, for example, that the individual defendants' use of the drawings is not permitted under the terms of the contract because they are not expressly named in the contract, an argument that borders on the absurd. If we were to accept this view, we would have to hold that while the contract would permit Magnificat itself to use the materials developed by Grusenmeyer in implementing the master plan, it would not allow any of the professionals that the school hired to do so. But, obviously, Magnificat never intended to complete the ultimate project contemplated in the contract -- that is, to design and build a performing arts center -- on its own and without the help of professionals. Indeed, Jeffrey Grusenmeyer recognized as much from the beginning, testifying that "the members of my firm created architectural drawings depicting building floor plans and site plans of the

then existing Magnificat campus, hoping that we would later be the successful bidder to design the performing arts center."

We also reject the plaintiff's insistence that our opinion in *Johnson* mandates a reversal of the district court's order, because we conclude that the facts in that case are fundamentally distinct from those now before us. In *Johnson,* we were not called upon to interpret a written contract but to determine the intentions of an architect and his client who had never reduced their agreement to writing. *See id.* at 497-99. In the absence of an express agreement, the issue was whether the architect had granted an *implied* license to use his work, which required discerning his intent based on the totality of the circumstances. *Id.* at 500-02. Obviously, no such task presents itself in this case because the agreement was not only in writing but was also, as the district court correctly found, unambiguous.

III. CONCLUSION

Because we agree with the district court's determination that the contract between Grusenmeyer and its client, Magnificat High School, permitted the defendants to use the plaintiff's drawings for the very purposes to which those drawings were put, we find it unnecessary to address the other issues raised on appeal, including the suitability of the drawings for copyright protection and the applicability of the fair use doctrine. The order of the district court awarding summary judgment to the defendants is, therefore, AFFIRMED.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION

CASE NO. 1:04 CV 2381

[Filed January 25, 2006]

JEFFREY A. GRUSENMEYER)
& ASSOCIATES, INC.,)
Plaintiff,)
)
v.)
)
DAVISON, SMITH & CERTO)
ARCHITECTS, INC., et al.,)
Defendants.)

JUDGES: DONALD C. NUGENT, United States District Judge.

MEMORANDUM OPINION AND ORDER

This matter comes before the Court upon the Motions for Summary Judgment filed by Defendants Davison, Smith & Certo Architects, Inc. and Randall Smith, William Davison, and Jeffrey Certo (collectively "Defendants") (ECF # 16, 30) and the Cross-Motion for Summary Judgment filed by

Plaintiff Jeffrey A. Grusenmeyer & Associates, Inc. ("Grusenmeyer") (ECF # 32).

I. BACKGROUND

Plaintiff is an architectural firm that was hired by Magnificat High School in Rocky River, Ohio ("Magnificat") in 1999. Pursuant to a contract between Plaintiff and Magnificat, Plaintiff was to, *inter alia,* "Provide a master plan for the implementation of the capital improvements program, including plans, renderings, and perspectives suitable for use in presentation and future reference during the master plan implementation." (ECF # 22, Ex. B.) Among other things, Plaintiff prepared drawings of existing conditions at Magnificat, which it provided to Magnificat on a computer disk.

In 2002, Magnificat hired Defendants to design and construct a performing arts center. Magnificat provided Defendants with a disk containing the existing facilities drawings prepared by Plaintiff. Defendants utilized the drawings in connection with its work for Magnificat.

On September 23, 2005, Plaintiff filed an Amended Complaint against Defendants, claiming that Defendants used Plaintiff's copyrighted "existing site and building conditions" without Plaintiff's permission or consent. (ECF # 23 at ¶ 10.) Plaintiff further alleges that "Defendants published their infringing copies of Plaintiff's Works" as "project number 02-090 for building additions and alterations" to Magnificat. (*Id.* at ¶ 11.) Plaintiff asserts entitlement to monetary and injunctive relief, as well as attorneys fees and costs, as a result of Defendants' allegedly infringing conduct. (*Id.* at ¶¶ 14-16.)

II. STANDARD OF REVIEW

Summary judgment is appropriate when the court is satisfied "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). The burden of showing the absence of any such "genuine issue" rests with the moving party:

> [A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any,' which it believes demonstrates the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986) (citing FED. R. CIV. P. 56(c)). A fact is "material" only if its resolution will affect the outcome of the lawsuit. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Determination of whether a factual issue is "genuine" requires consideration of the applicable evidentiary standards. The court will view the summary judgment motion in the light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

Summary judgment should be granted if a party who bears the burden of proof at trial does not establish an essential element of their case. *Tolton v. American Biodyne, Inc.,* 48 F.3d 937, 941 (6th Cir. 1995) (citing *Celotex,* 477 U.S. at 322). Accordingly, "the mere existence of a scintilla of evidence in support of the plaintiff's position will be

insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Copeland v. Machulis*, 57 F.3d 476, 479 (6th Cir. 1995) (citing *Anderson*, 477 U.S. at 252). Moreover, if the evidence presented is "merely colorable" and not "significantly probative," the court may decide the legal issue and grant summary judgment. *Anderson*, 477 U.S. at 249-50 (citations omitted). In most civil cases involving summary judgment, the court must decide "whether reasonable jurors could find by a preponderance of the evidence that the [non-moving party] is entitled to a verdict." *Id.* at 252. However, if the non-moving party faces a heightened burden of proof, such as clear and convincing evidence, it must show that it can produce evidence which, if believed, will meet the higher standard. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989).

Once the moving party has satisfied its burden of proof, the burden then shifts to the nonmover. The nonmoving party may not simply rely on its pleadings, but must "produce evidence that results in a conflict of material fact to be solved by a jury." *Cox v. Kentucky Dep't of Transp.*, 53 F.3d 146, 149 (6th Cir. 1995). FED. R. CIV. P. 56(e) states:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

The Federal Rules identify the penalty for the lack of such a response by the nonmoving party as an automatic grant of summary judgment, where otherwise appropriate. *Id.*

Though parties must produce evidence in support of and in opposition to a motion for summary judgment, not all types of evidence are permissible. The Sixth Circuit has concurred with the Ninth Circuit that "'it is well settled that only admissible evidence may be considered by the trial court in ruling on a motion for summary judgment.'" *Wiley v. United States,* 20 F.3d 222, 225-26 (6th Cir. 1994) (quoting *Beyene v. Coleman Sec. Servs., Inc.,* 854 F.2d 1179, 1181 (9th Cir. 1988)). FED. R. CIV. P. 56(e) also has certain, more specific requirements:

> [Rule 56(e)] requires that affidavits used for summary judgment purposes be made on the basis of personal knowledge, set forth admissible evidence, and show that the affiant is competent to testify. Rule 56(e) further requires the party to attach sworn or certified copies to all documents referred to in the affidavit. Furthermore, hearsay evidence cannot be considered on a motion for summary judgment.

Wiley, 20 F.3d at 225-26 (citations omitted). However, evidence not meeting this standard may be considered by the district court unless the opposing party affirmatively raises the issue of the defect.

> If a party fails to object before the district court to the affidavits or evidentiary materials submitted by the other party in support of its position on summary judgment, any objections to the district court's consideration of such materials are deemed to have been waived, and [the Sixth Circuit] will review such objections only to avoid a gross miscarriage of justice.

Id. at 226 (citations omitted).

As a general matter, the district judge considering a motion for summary judgment is to examine "only disputes over facts that might affect the outcome of the suit under governing law." *Anderson,* 477 U.S. at 248. The court will not consider non-material facts, nor will it weigh material evidence to determine the truth of the matter. *Id.* at 249. The judge's sole function is to determine whether there is a genuine factual issue for trial; this does not exist unless "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Id.*

In sum, proper summary judgment analysis entails "the threshold inquiry of determining whether there is the need for a trial--whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson,* 477 U.S. at 250. It is with this standard in mind that the instant Motions must be decided.

III. DISCUSSION

In their respective Motions for Summary Judgment, Defendants generally set forth three arguments.[1] First, Defendants contend that they have not infringed on a valid copyright, because the work at issue is not original. Second, Defendants assert that the contract between Plaintiff and Magnificat permits Defendants' use of the material. Third, Defendants argue that the fair use doctrine allows them to use the material at issue. To the contrary, in its Motion for Summary Judgment, Plaintiff argues that its copyright is

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[1] As acknowledged below, the individual Defendants have also argued that they should not be held personally liable for the alleged copyright infringement. (ECF # 30.)

valid, and that Defendants had no license to use its work. The Court now examines these arguments.

A. Originality

In support of their Motions for Summary Judgment, Defendants argue that Plaintiff cannot, as a matter of law, establish a valid copyright, because the drawings are not original, as defined by copyright law. That is, Defendants contend that Plaintiff's drawings are a compilation of facts, and do not possess the requisite degree of creativity necessary for copyright protection. Conversely, Plaintiff asserts that its expression of the factual material is unique. Plaintiff states that it used AutoCAD computer software to create the drawings, and that the types of information depicted, the level of detail, and the scale and arrangement of the information into layers in AutoCAD files are all part of the process which give rise to originality of expression, selection and arrangement in this case.

Although the originality requirement is not stringent, there is a narrow category of works that fail to meet the requirement because "the creative spark is utterly lacking or so trivial as to be virtually nonexistent." *Feist Publications, Inc. v. Rural Telephone Serv. Co.*, 499 U.S. 340, 111 S. Ct. 1282, 1294, 113 L. Ed. 2d 358 (1991). In *Feist,* for example, the plaintiff was a telephone utility company that brought an action against a publisher of an area-wide telephone directory. The plaintiff alleged copyright infringement, because the defendant's area-wide directory included listings in the plaintiff's local telephone directory. *Id.* at 1286-87. In rejecting the plaintiff's claim of copyright infringement, the Supreme Court stated:

> [the plaintiff]'s selection of listings could not be more obvious: It publishes the most basic information - name, town, and telephone number- about each person who applies to it for telephone service. This is "selection" of a sort, but it lacks the modicum of creativity necessary to transform mere selection into copyrightable expression. [The plaintiff] expended sufficient effort to make the white pages directory useful, but insufficient creativity to make it original.
>
> * * *
>
> As a constitutional matter, copyright protects only those constituent elements of a work that possess more than a *de minimis* quantum of creativity. [The plaintiff]'s white pages, limited to basic subscriber information and arranged alphabetically, fall far short of the mark. As a statutory matter, 17 U.S.C. § 101 does not afford protection from copying to a collection of facts that are selected, coordinated, and arranged in a way that utterly lacks originality. Given that some works must fail, we cannot imagine a more likely candidate. Indeed, were we to hold that [the plaintiff]'s white pages pass muster, it is hard to believe that any collection of facts could fail.

Id. at 1296-97. Accordingly, because the listings were "devoid of even the slightest trace of creativity," the Court found that they were not original and not entitled to copyright protection. *Id.* at 1296.

The Second Circuit examined copyright protection as it relates to architectural drawings in *Sparaco v. Lawler, Matusky, Skelly, Engineers, LLP*, 303 F.3d 460 (2d Cir. 2002). In that case, the plaintiff was a surveyor hired to

develop a "site plan" for an assisted living facility. *Id.* at 461. A site plan "specifies existing land conditions, including topography, boundaries, and physical structures, and can also specify proposed improvements to the site." *Id.* In reviewing the plaintiff's claim that the defendants infringed on the copyright of his site plan, the Second Circuit held that, to the extent that the site plan depicted existing physical characteristics, it did not constitute copyrightable expression. *Id.* at 467. More specifically, the Court stated:

> To the extent that the site plan sets forth the existing physical characteristics of the site, including its shape and dimensions, the grade contours, and the location of existing elements, it sets forth facts; copyright does not bar the copying of such facts. Facts, whether alone or as part of a compilation, are not original and therefore may not be copyrighted.

Id. Because the Court found that the portion of the site plan depicting existing conditions lacked originality, it held that the plaintiff's claim of infringement as to that information must fail. *Id.*

In deciding whether the drawings are original under the law, this Court must determine whether they possess more than a *de minimis* quantum of creativity. After a thorough review of the relevant law, and the arguments and evidence set forth by the parties as to this issue, the Court finds that the drawings do not constitute copyrightable expression. Like the site plan in *Sparaco,* Plaintiff's drawings set forth the existing physical characteristics of the facilities at Magnificat and, as such, they set forth facts. The Court finds that Plaintiff's decisions as to design details are not sufficiently unique so as to render the drawings protected. As explained in *Feist,* although Plaintiff may have dedicated considerable time to the

existing conditions drawings, copyright law rewards originality, rather than effort. *Feist,* 111 S. Ct. at 1296.

Similarly, Plaintiff's use of AutoCAD to create and store the information contained in the drawings does not give rise to copyright protection. Mr. Grusenmeyer made clear in his deposition testimony that Plaintiff submitted the drawings in hard copy with its copyright application, rather than in electronic format. (ECF # 36, Ex. A at 73-74.) As such, Plaintiff cannot demonstrate that it obtained a copyright for the electronic arrangement of the drawings, and its claim of infringement must fail.[2]

Based upon the foregoing, the Motions for Summary Judgment filed by Defendants (ECF # 16, 30) are GRANTED and the Cross-Motion for Summary Judgment filed by Plaintiff is DENIED (ECF # 32). Moreover, as set forth below, even had the Court found that the copyright as to the existing conditions drawings was valid, the rulings on the pending Motions would remain the same. To that end, the Court now examines the arguments relating to the contract between Plaintiff and Magnificat.

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[2] Plaintiff does not deny that it submitted the drawings in hard copy, but asserts that the Fourth Circuit's decision in *M. Kramer Mfg. Co. v. Andrews,* 783 F.2d 421 (4th Cir. 1986) demonstrates that the AutoCAD files are protected. (ECF # 37 at 8-9.) The Court finds Plaintiff's argument to be unconvincing. The *Kramer* case, which examined whether an audiovisual copyright of a computer game extended to the computer program that implemented the audiovisuals, involved issues distinct from those in the instant matter, and it is factually distinguishable from this case. Accordingly, the Court finds Plaintiff's assertion that copyright protects its arrangement of the files in AutoCAD to be without merit.

B. Contract Between Plaintiff And Magnificat

Defendants assert that the contract between Magnificat and Plaintiff allowed Defendants to use the existing conditions drawings. More specifically, Defendants argue the following:

> Magnificat paid Plaintiff approximately $15,000 to prepare, in part, an existing condition plan. The contracted [sic] provided, in relevant part: "3. Provide a master plan for the implementation of the capital improvements program, **including plans, renderings and perspectives suitable for use in the presentation and future reference during master plan implementation."** (Emphasis added).
>
> Article 6.1 of the Abbreviated Form Agreement, which was purportedly incorporated by reference in the contract, also permits Defendant's use of the drawings. This section provides that the drawings prepared by the architect can be utilized by the owner (Magnificat) on other drawings if agreed to in writing and if the architect is compensated. As set forth in the preceding paragraph, Plaintiff and Magnificat did agree that the plans prepared by Plaintiff could be utilized for future reference during the master plan implementation and Plaintiff was compensated for preparing the drawings.
>
> Magnificat acted in accordance with the terms of this contract when it provided the existing conditions plans to Defendant to be utilized by it in implement [sic] the master plan, namely the performing arts center. Accordingly, the contract at issue permits Defendant's use of the plans.

(ECF # 16 at 12-13.) Based upon the foregoing, Defendants claim that they are entitled to summary judgment in their favor.

In support of its cross-Motion for Summary Judgment, Plaintiff asserts that its contract with Magnificat did not require it to create the drawings of existing conditions. Plaintiff argues that it provided the drawings to Dona Koma at Magnificat "as a personal favor," and the drawings were "not transferred under any obligation created by Plaintiff's contract with Magnificat." (ECF # 22 at 13-14.) Plaintiff states, "There is a big difference between use of the 'Master Plan' described in the contract, and the unauthorized use of the AutoCAD drawings of existing conditions provided to Don Koma by Grusenmeyer for Koma's personal use as a reference in doing maintenance at Magnificat." (ECF # 35 at 4.)

Because the Court finds, as a matter of law, that the contract at issue is unambiguous, it may not attempt to discern the intent of the parties. *See United States v. Donovan,* 348 F.3d 509, 512 (6th Cir. 2003). Here, the plain language of contract called for Plaintiff to prepare a master plan "for the implementation of the capital improvements program, including plans, renderings and perspectives suitable for use in the presentation and future reference during master plan implementation." (ECF # 16, Ex. B.) As provided in the contract, the program for capital improvements included the building of a "Fine Arts/Band Practice/Auditorium type space[]." (*Id.*) It is undisputed that Plaintiff provided Magnificat with existing conditions drawings, and that those drawings were used in connection with the development of the Performing Arts Center at Magnificat. As such, the existing conditions drawings fall within the scope of Plaintiff's

responsibilities under the contract, for which Magnificat paid Plaintiff approximately $15,000.[3] (*Id.*)

It is consistent with logic that drawings of existing conditions would be necessary for the implementation of the capital improvements program and would therefore be included within Plaintiff's responsibilities under the contract. Equally logical is the fact that such drawings may be used in the implementation, in return for the compensation that Magnificat paid to Plaintiff. Accordingly, even had the Court found that the copyright as to the existing conditions drawings was valid, the Court would still grant the Motions for Summary Judgment filed by Defendants, and deny the Cross-Motion for Summary Judgment filed by Plaintiff.

Having found Defendants' Motions for Summary Judgment to be meritorious, the Court need not reach the arguments concerning the fair use doctrine or the personal liability of the individual Defendants. Furthermore, Defendants' Motion to Strike Certain Portions of Jeffrey Grusenmeyer's Affidavit Attached to Plaintiff's Motion for Summary Judgment (ECF # 33) is DENIED as MOOT.

IV. CONCLUSION

Based upon the foregoing, Defendants' Motions for Summary Judgment are GRANTED (ECF # 16, 30) and Plaintiff's Cross-Motion for Summary Judgment is DENIED (ECF # 32). Furthermore, Defendants' Motion to Strike

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[3] Article 6.1 of the 1987 Edition of the Abbreviated Form of Agreement Between Owner and Architect, incorporated in the contract, further supports this conclusion by providing that others, such as Defendants, may use Plaintiff's work if agreed to in writing and accompanied by appropriate compensation. (ECF # 16, Ex. D.)

Certain Portions of Jeffrey Grusenmeyer's Affidavit Attached to Plaintiff's Motion for Summary Judgment (ECF # 33) is DENIED as MOOT.

IT IS SO ORDERED.

/s/
DONALD C. NUGENT
United States District Judge

DATED: January 25, 2006

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION

CASE NO. 1:04 CV 2381

[Filed January 25, 2006]

JEFFREY A. GRUSENMEYER & ASSOCIATES, INC., Plaintiff,	)
v.	)
DAVISON, SMITH & CERTO ARCHITECTS, INC., et al., Defendants.	)

JUDGES: DONALD C. NUGENT, United States District Judge.

JUDGMENT

Pursuant to a Memorandum Opinion and Order of this Court, the Motions for Summary Judgment filed by Defendants Davison, Smith & Certo Architects, Inc. and Randall Smith, William Davison, and Jeffrey Certo (collectively "Defendants") (ECF # 16, 30) are GRANTED and the Cross-Motion for Summary Judgment filed by

Plaintiff Jeffrey A. Grusenmeyer & Associates, Inc. (ECF # 32) is DENIED. Furthermore, Defendants' Motion to Strike Certain Portions of Jeffrey Grusenmeyer's Affidavit Attached to Plaintiff's Motion for Summary Judgment (ECF # 33) is DENIED as MOOT. This case is TERMINATED.

IT IS SO ORDERED.

/s/
DONALD C. NUGENT
United States District Judge

DATED: January 25, 2006

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 1:04 CV 2381

[Filed September 14, 2005]

Jeffrey A. Grusenmeyer & Associates, Inc. Plaintiff,	)
vs.	)
Davison, Smith & Certo Architects, Inc., *et al.* Defendants.	)

JUDGE DONALD C. NUGENT

AFFIDAVIT OF
JEFFREY A. GRUSENMEYER

My name is Jeffrey A. Grusenmeyer, President of Jeffrey A. Grusenmeyer & Associates, Inc., the Plaintiff in this action. My firm entered into a contract to provide Magnificat High School with master planning services in preparation for the anticipated addition of a performing arts center to its campus. Separate and apart from the requirements of that contract, the members of my firm created architectural drawings depicting building floor plans and site plans of the

then existing Magnificat campus, hoping that we would later be the successful bidder to design the performing arts center.

These separate drawings, including proposed additions and changes, were filed with the U.S. Copyright Office, for which copyright registration certificates Number VAu-550-604 (Architectural Works) and Number VAu-584-268 (Technical Drawings) were issued.

To create the first and second floor plans (which resulted in the ultimate creation of AutoCAD files "9907-101.dwg" and "9907-102.dwg"), we obtained numerous sets of drawings from Magnificat High School. We met with Don Koma (Facilities Director at MHS) and went through the numerous sets of drawings they have in the maintenance office. There are probably 50 to 70 sets. We had to determine which information may be useful and which was not. From this, I selected approximately 7 to 8 sets of drawings. Each of these sets were working drawings for a portion of the building, or a renovation of a portion of the building or site. No set contained the entire building or site. None were 'up to date' by any stretch of the imagination.

In our office, we reviewed each set and determined which pages of information from each set may be of any use. These were generally the plans and enlarged plans. Each set has plans, sections, elevations, specifications, dimensions, etc. From these plans, we determined which information on the plan was needed. Each plan has notes, dimensions, and other information that we decided was not needed.

We then drafted on computer the selected information. The drafting in itself is unique to each office (using our symbols and drafting standards). For example, the information level selected can vary widely (do you show

lockers, doors, stairs, etc.). The expression method varies widely (do you draw to 1" or other snap or actual dimensions, how are layers set up, we set them up by year, etc.). Each architectural drawing, although showing conditions which are fixed, will vary by what the creating architect desires for its use and presentation. This is why an architectural drawing is sometimes better compared to an artistic picture than a list of facts. Although much of an existing drawing represents facts, they are individual representations that each architect will do substantially differently. It is also how I can tell, without title block or other printing, (just line work) that the drawing was mine.

Each portion of the building was drafted in pieces. You can see them 'grow' in the various drawings we prepared by year by turning on that year's layers. During this process, we continually field measured areas that were missing on the drawings, and updated areas of existing building/building additions that had been renovated. Some of these renovations were on drawings, some were not. For example, the chapel was not on any drawing that we could locate and had to fully measure and add it in. Second floor classrooms had been renovated to science rooms (some were on drawings) and we had to modify many of these.

To create the site plan, (which resulted in the ultimate creation of AutoCAD file "9907-C101.dwg"), we followed basically the same process as the floor plans, except we also obtained topographic and tax map information from our engineer and incorporated it into the drawing. We did extensive on site measurements to show sports fields, site improvements, building shapes, parking, etc, not indicated on any previous drawings. We then added parking lot information we designed for the site.

The architectural drawings represented by Plaintiff's Exhibit 2-C, produced by Davison in the Davison deposition taken May 25, 2005, and referenced in my deposition of July 7, 2005, from which Davison admits copying, were the AutoCAD files "9907-101.dwg" and "9907-C101.dwg." As previously stated in my deposition testimony, Plaintiff's Exhibit 2-C was printed from the above electronic files earlier in the process of preparing those drawings for submission to the Copyright Office.

Signed:/s/_____
Jeffrey A. Grusenmeyer, President
Jeffrey A. Grusenmeyer & Associates, Inc.
21245 Lorain Road, Suite 203
Fairview Park, Ohio 44126

State of Ohio
Cuyahoga County

Jeffrey A. Grusenmeyer, under the penalties of perjury, sworn to, and subscribed in my presence, on this 13th day of September, 2005.

/s/Judith E. Norton
Notary Public

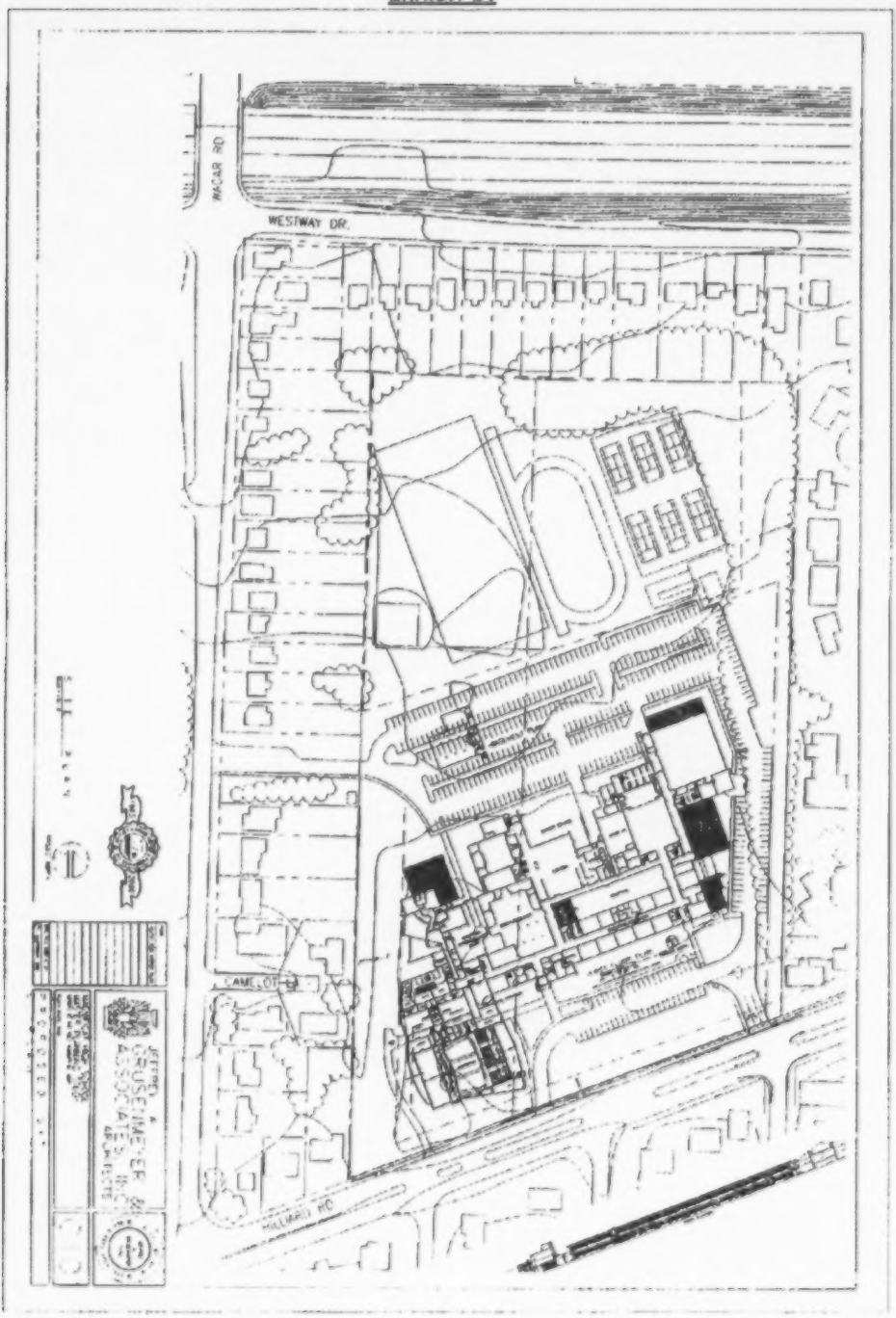
JUDITH E. NORTON
Notary Public, State of Ohio
My Commission Expires Feb. 7, 2008

APPENDIX G

Docket Entry No. 32-2
Filed November 11, 2005
Representative Samples of Registered Drawings

[Fold-out Exhibits, next 3 pages]

EXHIBIT B1



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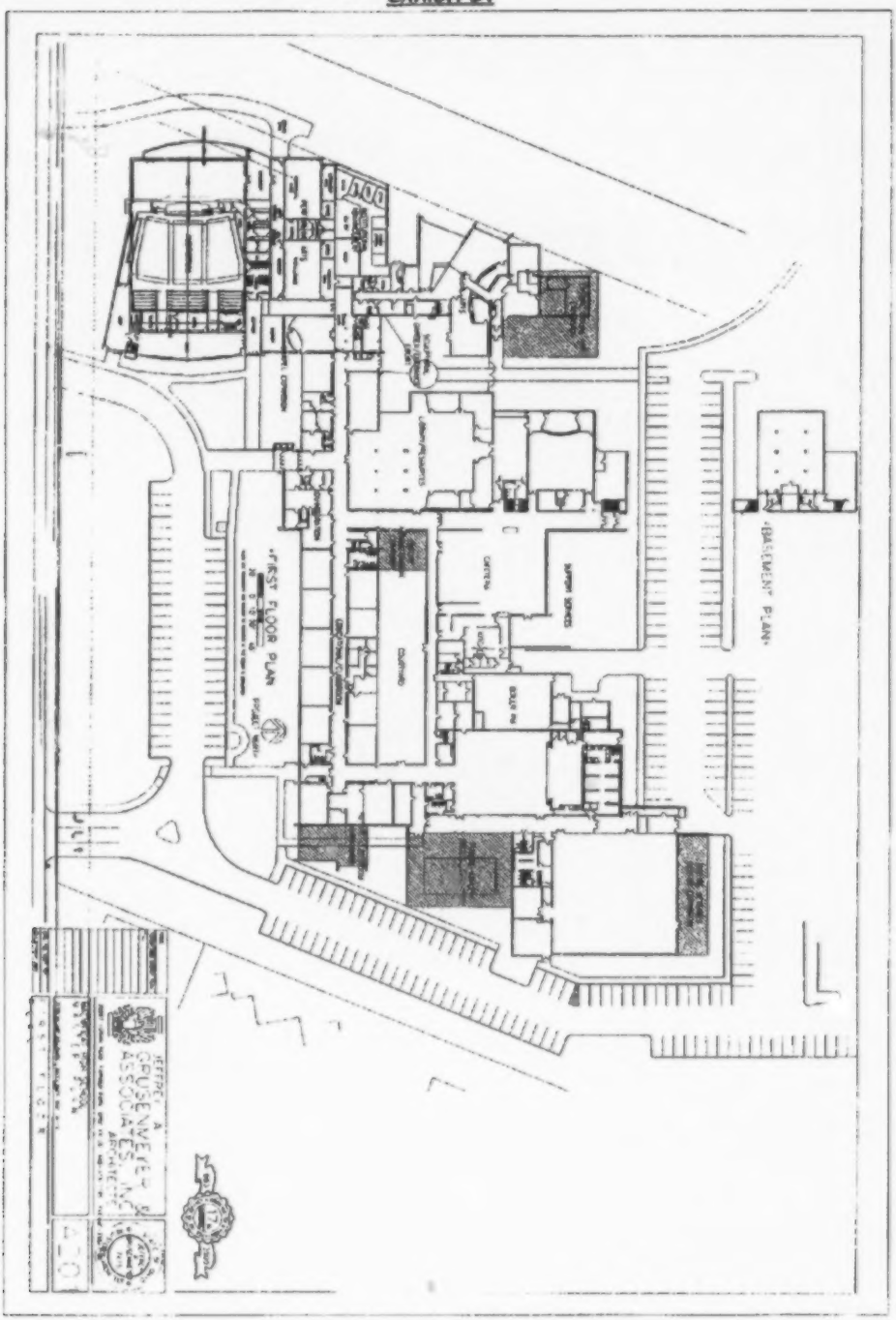

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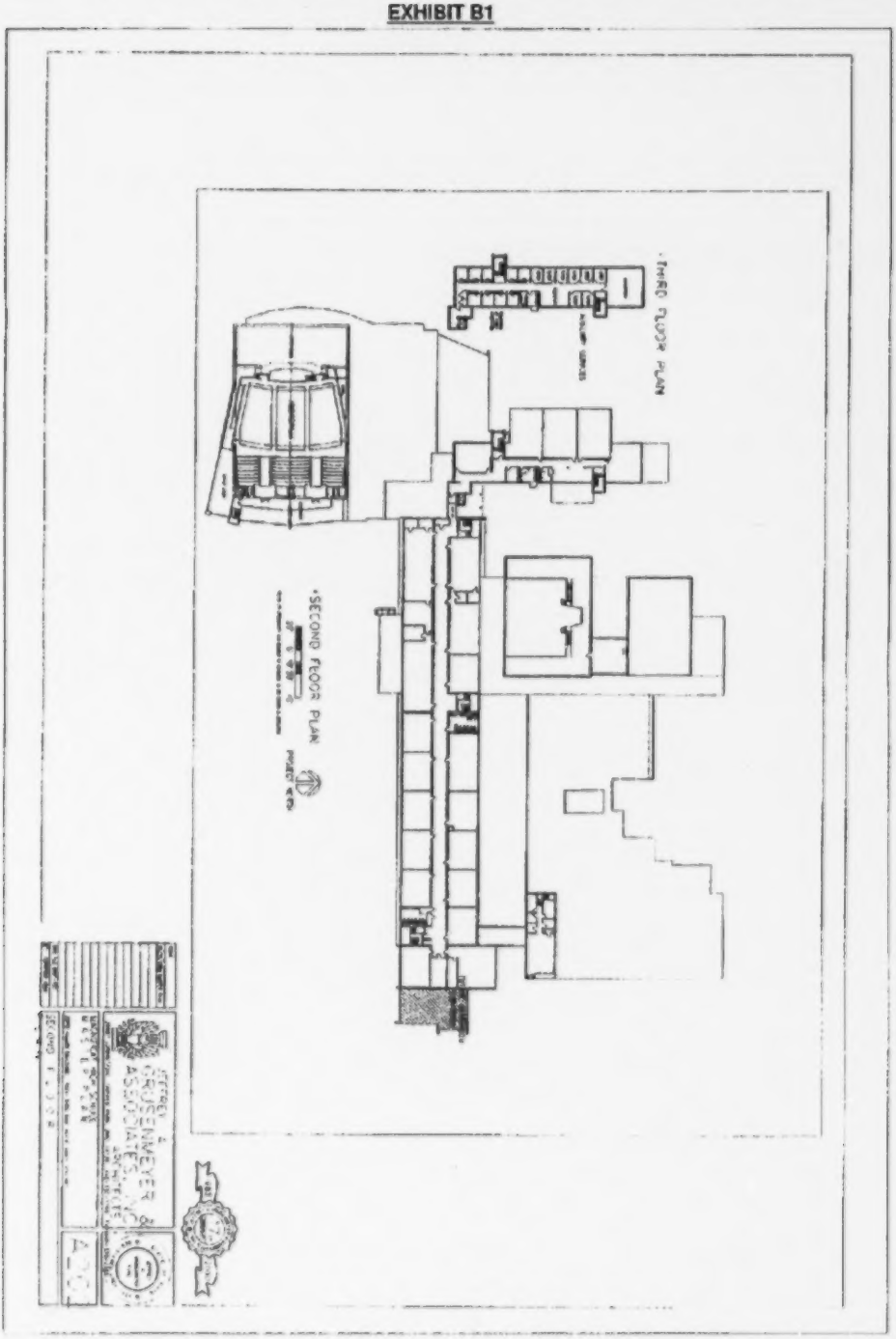

No. 07-122

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

JEFFREY A. GRUSENMEYER & ASSOCIATES, INC.,

Petitioner,

v.

DAVISON SMITH & CERTO ARCHITECTS, INC., WILLIAM R. DAVISON, RANDALL S. SMITH, JEFFREY M. CERTO,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Petitioner has presented compelling reasons to grant the Petition so that this Court can review the Sixth Circuit's unpublished Opinion affirming the District Court's summary judgment in favor of Respondents, where the Petition fails to establish that the Sixth Circuit's ruling is in conflict with a decision of another Court of Appeals or implicates an important federal question that has not been settled by this Court.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULES 29.6 AND 14.1(b)

There are no parties to the proceedings other than those listed in the caption.

Respondent Davison Smith & Certo Architects, Inc. is a privately held Ohio professional corporation that has no parent corporation and no publicly held company owns 10% or more of its stock.

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BRIEF OF RESPONDENTS IN OPPOSITION

INTRODUCTION

This case arises out of a dispute between two competing architectural firms involving the use of "existing site and building conditions" drawings prepared as part of a capital improvements program for an all-girls private high school located in a suburb of Cleveland. (Pet. App. at 16a). The case was litigated in the United States District Court for the Northern District of Ohio which ultimately entered summary judgment in favor of the defendants. An appeal was filed from that judgment to the United States Court of Appeals for the Sixth Circuit which affirmed the District Court in an unreported per curiam Opinion. Petitioner has filed a petition with this Court seeking a writ of *certiorari* to the United States Court of Appeals for the Sixth Circuit. However, Petitioner has failed to present any "compelling reasons" for the Court to grant this Petition for a Writ of *Certiorari*. See, Sup. Ct. R. 10.

Specifically, Petitioner fails to demonstrate that the Sixth Circuit's January 8, 2007 unpublished per curiam Opinion is in conflict with the decision of another United States court of appeals on the same issue or that the Sixth Circuit decided an important federal question that is yet unsettled in this Court. See, Sup. Ct. R. 10(a) and 10(c). In fact, Petitioner has advanced propositions of law that were never addressed or resolved by the Sixth Circuit. Despite these efforts, Petitioner has failed to establish that

the Sixth Circuit's Opinion was erroneously decided or misapplied an established rule of law, even though *certiorari* is "rarely granted" even when such grounds have been demonstrated. See, Sup. Ct. R. 10.

Therefore, the Petition should be denied.

CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE BY THE COURTS BELOW

The list of citations set forth at page 1 of the Petition is correct.

CONCISE STATEMENT OF THE BASIS FOR JURISDICTION IN THIS COURT

The jurisdictional statement appearing at page 1 of the Petition is correct.

COUNTER-STATEMENT OF THE CASE

A. Grusenmeyer Contracts with Magnificat High School to Prepare Existing Conditions Drawings.

The dispute in this case centers principally around existing conditions drawings that were prepared by Petitioner, Jeffrey A. Grusenmeyer & Associates, Inc. ("Grusenmeyer" or "Petitioner") in 1999

for Magnificat High School ("Magnificat"), a private, all-girls Catholic high school located in Rocky River, Ohio, a suburb on the westside of Cleveland. At the time, Magnificat was contemplating a capital improvements program that would include the construction of a new fine arts/band/auditorium building on its suburban campus.

So, in the Spring of 1999, Magnificat sent out a Request for Proposal for a Master Plan Project and received responses from four or five architects. Grusenmeyer and Respondent Davison Smith & Certo Architects, Inc. ("DS&C") were two of the architectural firms that submitted responsive proposals.

Approximately two months after submission of the bids, Grusenmeyer was awarded the Master Plan Project. On or about June 2, 1999, Grusenmeyer prepared a two-page letter agreement and forwarded it to Magnificat's president, Sister Carolyn Marshall, to sign. (Pet. App. at 6a-7a). Grusenmeyer was to be paid approximately $15,000 for its services, with the first $2,000 provided on a donated basis. (Pet. App. at 7a). While the contract further provided that the services would be in accordance with AIA document B151, Abbreviated Form of Agreement Between Owner and Architect, 1987 Edition, Articles 3 through 10, and the American Institute of Architect's Code of Ethics, Grusenmeyer never provided Magnificat with either the "Code of Ethics" or the Abbreviated Form Agreement. (Pet. App. at 11a).

The written letter agreement provided that Grusenmeyer was engaged to:

> 1. Review of the existing facilities' conditions including architectural, mechanical, electrical, structural and plumbing work; making such recommendations as are appropriate regarding maintenance and improvement of the facilities;
>
> 2. Review and develop a program for capital improvements including the areas discussed during the site visit of April 23, 1999 (Parking Institutional Advancement Group offices, State Aid Instructional Spaces, and Fine Arts/Band Practice/Auditorium type spaces) as well as other areas that may be developed during the planning process; and
>
> 3. Provide a master plan for the implementation of the capital improvements program, including plans, renderings and perspectives suitable for use in the presentation and future reference during master plan implementation.

(Pet. App. at 7a).

B. Grusenmeyer's Creation of Master Plan, Which Included Drawings of Existing Conditions.

Pursuant to this contract, one of Grusenmeyer's obligations in developing the Master Plan was to prepare a plan of existing conditions at Magnificat.

(Pet. App. at 7a). In order to create the plan of existing conditions, Grusenmeyer obtained certain basic information – namely lot lines, house locations and street information – from its own civil consultant. The civil consultant obtained much of this information from public records available from the Cuyahoga County Recorder's Office. Grusenmeyer also took field measurements of the existing interior work (buildings) and utilized existing drawings (5 to 7 sets) of the buildings that were in the possession of Magnificat to complete his drawings of the existing structures. Some of the existing drawings that were utilized by Grusenmeyer had actually been prepared by DS&C in connection with earlier renovations and additions to the school.[1] During a discovery deposition, Grusenmeyer principal Jeffrey Grusenmeyer testified that "if there was information we felt useful, we used it."

Grusenmeyer completed the Master Plan and drawings in approximately September 1999. Once Magnificat received the Master Plan, it was disseminated to Sister Carolyn Marshall, its principal, and to a member of its plant committee, and possibly others. Sister Carolyn Marshall testified that Magnificat was of the belief that there were no limitations upon its

[1] While Grusenmeyer previously had not performed any architectural services for Magnificat, DS&C had been engaged to renovate the school's convent building into school and classroom space, designed a gymnasium addition and remodeled the science labs.

use of the drawings it received from Grusenmeyer in the future implementation of the capital improvements program, of which the Master Plan was a part. After all, Magnificat had paid Grusenmeyer to create the Master Plan and existing conditions drawings for its use. This understanding was, as the District Court aptly noted, "consistent with logic." (Pet. App. at 27a).

In addition to the drawings, Grusenmeyer also provided an AutoCAD file containing only the existing conditions drawings to Mr. Don Koma, Magnificat's facility director. (Pet. App. at 7a-8a).

C. Magnificat's Second RFP and Contract with DS&C.

Magnificat sent out a second Request for Proposal to eleven companies regarding the design and construction of a performing arts center. Both Grusenmeyer and DS&C submitted proposals. (Pet. App. at 8a). After extensively interviewing seven of the companies, DS&C was judged to be the best firm to handle the project and the project was awarded accordingly. (Pet. App. at 8a). On December 4, 2002, the contract with DS&C for the design of Magnificat's performing arts center was executed.

After DS&C was awarded the contract, Magnificat provided a disk containing the existing conditions drawings to DS&C. (Pet. App. at 8a). It was Sr. Marshall's belief and understanding that the architects needed the drawings of the existing buildings to facilitate their work. (Pet. App. at 8a). The disk

provided to DS&C did not have any of Grusenmeyer's original ideas; it was all existing conditions. DS&C has admitted only that it received a disk from Magnificat that exclusively contained existing conditions. After receiving that disk, in order to fulfill its contractual obligations, DS&C confirmed and then utilized, if confirmed, the drawings of the existing conditions, took its own field measurements, utilized its own paper drawings for additions it had done to the buildings in the past and the drawings of other architects relating to other work in order to create its drawings for the performing arts center. All of this was done as part of the protocol of the industry. (Pet. App. at 9a). It was DS&C's belief that Magnificat paid Grusenmeyer for the work and would not have provided DS&C with the disk unless they could utilize it.

D. Legal Proceedings Below.

On December 1, 2004, Grusenmeyer initiated this case by filing a Complaint, later amended with leave of court, in the United States District Court for the Northern District of Ohio. In its pleadings, Grusenmeyer sought damages and injunctive relief for alleged copyright infringement. Grusenmeyer's claims were made against DS&C and Respondents William R. Davison, Randall S. Smith and Jeffrey M. Certo.[2]

---

[2] Unless the context requires otherwise, these individual Respondents shall be designated jointly throughout this brief as DS&C.

On January 25, 2006, the District Court entered its final judgment in the form of a Memorandum Opinion and Order granting summary judgment in favor of DS&C and denying Grusenmeyer's cross-motion. (Pet. App. at 15a-30a). In doing so, the District Court stated that "[a]fter a thorough review of the relevant law, and the arguments and evidence set forth by the parties as to this issue, the Court finds that the drawings do not constitute copyrightable expression." (Pet. App. at 23a). Additionally, even if the existing conditions drawings were deemed copyrightable, the District Court found that the unambiguous terms of the written contract between Magnificat and Grusenmeyer and the compensation paid to Grusenmeyer by Magnificat allowed DS&C's use of the existing conditions drawings in connection with the development of the performing arts building. (Pet. App. at 26a-27a).

In Grusenmeyer's appeal to the United States Court of Appeals for the Sixth Circuit, the District Court's judgment was unanimously affirmed. (Pet. App. at 5a-14a). Because the Sixth Circuit agreed with the District Court's determination that the contract between Grusenmeyer and Magnificat permitted DS&C to use the existing conditions drawings, the Sixth Circuit found it "unnecessary to address the other issues raised on appeal, including the suitability of the drawings for copyright protection and the applicability of the fair use doctrine." (Pet. App. at 14a). Upon Grusenmeyer's petition for

rehearing en banc, the petition was denied. (Pet. App. at 3a-4a).

Thus, DS&C was entitled to summary judgment in its favor as no genuine issues as to any material facts were found and, as the District Court properly determined, DS&C was and is entitled to judgment as a matter of law. Based upon the District Court's thorough and well-reasoned decision, that judgment was appropriately affirmed by the Sixth Circuit.

REASONS FOR DENYING THE PETITION

The Petition satisfies none of the criteria for a grant of *certiorari*. Petitioner has pointed to no genuine conflict created by the Sixth Circuit's opinion here and any decision of another court of appeals or this Court's precedent. Instead, Petitioner accuses the Sixth Circuit of having "exhibited an antipathy toward recognizing copyrights for technical drawings," and for imposing a "categorical rule" that jeopardizes "uniform application" of the copyright laws. (Pet. at 4, 11). Yet, there is absolutely no indication that the Sixth Circuit's opinion even addressed the question whether Grusenmeyer's drawings were suitable for copyright protection. The issues raised in the Petition are artificial, entirely specious and concocted solely to make it seem as though the case warrants discretionary review by this Court.

Moreover, even if there *were* a circuit conflict on copyrightability of the architectural drawings here,

that conflict would not justify a grant of *certiorari* in this case because resolution of the conflict would not alter the Sixth Circuit's affirmance of the District Court's summary judgment on the dispositive contract issue.

Based upon a considered assessment of the record and the arguments made by Petitioner, all indications are that the Sixth Circuit considered and decided the one dispositive issue raised in this appeal, first at the merit stage (Pet App. at 5a-14a), and then upon Petitioner's request for rehearing en banc pursuant to Fed. R. App. P. 35. (Pet. App. at 3a-4a).

For any number of reasons, a decision by this Court would have little or no effect. It would be a waste of private and judicial resources to debate the copyrightability of these particular architectural drawings – particularly because the Sixth Circuit never passed on the issue – and/or the legal interpretation of the particular contract in this fact-specific context. The Sixth Circuit's decision is consistent with the law in other circuits and its decision is plainly correct.

In short, Petitioner has presented no reason why the Court should grant *certiorari*. The Petition should be denied.

I. THE SIXTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH THIS COURT'S PRECEDENT OR THE LAW IN ANY OTHER CIRCUIT.

A. The Sixth Circuit Did Not Announce a "Categorical Rule" of Law Denying Copyright Protection in Regard to Architectural Drawings of Existing Conditions.

The petition in this case is premised on the erroneous assumption that "the Sixth Circuit has exhibited an antipathy toward recognizing copyrights for technical drawings * * * ." (Pet. at 4). According to Petitioner, "[t]he Sixth Circuit's affirmance of the district court's reliance in this case on the version of *Sparaco* as cited in *ATC*, further established the circuit's *categorical rule* denying copyright protection to architectural drawings of existing conditions." (Pet. at 5-6) (emphasis added). But there is no holding by the Sixth Circuit – or the District Court for that matter – adopting a "categorical rule" on this precise issue.

1. To begin with, the Sixth Circuit did not simply remain silent and thereby impliedly consent to all aspects of the District Court's rationale for granting summary judgment to DS&C, as Petitioner would have it. (Pet. at 5 n. 2). Rather, far from articulating a "categorical rule" on the copyrightability of the existing conditions drawings at issue here, the Sixth Circuit's affirmance was expressly restricted to the conclusion that "the district court correctly determined

that the defendants' use was permitted by contract * * * ." (Pet. App. at 6a). Given the disposition of the fact-specific contract issue, the Sixth Circuit found it "unnecessary to address the other issues raised on appeal, including the suitability of the drawings for copyright protection * * * ." (Pet. App. at 14a).

The case relied upon by Petitioner to support the argument that the Sixth Circuit's opinion means something more than it actually says on the issue of whether Grusenmeyer's drawings were entitled to copyright protection, *Ylst v. Nunnemaker*, 501 U.S. 797 (1991), does not lead to the conclusion being advanced in the Petition. The order being examined by this Court in *Ylst* presented difficulty because it was an "unexplained order," in connection with a habeas proceeding, which was clarified to "mean an order whose text or accompanying opinion does not disclose the reason for the judgment." Id. at 802. This Court's concern was triggered because "sometimes the members of the court issuing an unexplained order will not themselves have agreed upon its rationale, so that the basis of the decision is not merely undiscoverable but nonexistent." Id. Here, the Sixth Circuit's affirmance of the District Court cannot be said to be such an "unexplained order" and the maxim in the Petition has no application.

It is unmistakably evident from the Sixth Circuit's opinion that its ruling rested on the particular facts and legal construction of the Grusenmeyer-Magnificat contract in this case. Consequently, Petitioner's first proposition is incorrect, both legally and

factually. The Sixth Circuit did not issue, even by subtle implication, the sweeping legal pronouncement that Petitioner attributes to it. Indeed, the Sixth Circuit's opinion could be read to suggest just the opposite conclusion: that the Court assumed, without the need to decide for purposes of its ruling in this case, that Grusenmeyer's drawings actually were entitled to full copyright protection.

The Petition asks this Court to "reject the Sixth Circuit's categorical rule in this case." (Pet. at 11). But, because the Sixth Circuit did not adopt any such "categorical rule" in this case in regard to copyright protection for architectural drawings of existing conditions, the Petitioner's first proposition of law should not be addressed by this Court. It is this Court's practice to decide cases only on the grounds and issues that were actually addressed by the court of appeals. See, e.g., *Owasso Independent School Dist. No. I-011 v. Falvo*, 534 U.S. 426, 431 (2002). Whether Grusenmeyer's architectural drawings of the existing conditions on the Magnificat campus were or were not subject to copyright protection was never addressed by the Sixth Circuit. It need not and should not be addressed by this Court.

2. Try as Petitioner might to devise a "legal standard" that the Sixth Circuit transgressed, there is none. There is no legal standard that can be articulated or clarified by this Court in this case on the issue of whether architectural drawings of existing conditions are sufficiently original to merit copyright protection. The Petition acknowledges that "the

standard of analysis for determining originality in factual compilations" is already set forth in this Court's opinion in *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991). (Pet. at 8). While Petitioner may disagree with the District Court's conclusions based upon its application of the *Feist* standard to the precise drawings and facts – again the Sixth Circuit never addressed the issue – there is no reason for this Court to review such a fact-specific decision, particularly because it involves the application of settled legal standards. The Supreme Court's discretionary review does not extend to address merely the correctness of the judgment below. *Ross v. Moffitt*, 417 U.S. 600, 617 (1974).

Petitions for writs of *certiorari* are not granted "to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925); see also *Texas v. Mead*, 465 U.S. 1041 (1984) (Stevens, J.); Sup. Ct. R. 10 (*certiorari* is "rarely granted when the asserted error consists of erroneous factual findings"). Yet the copyright issue in this case was decided by the District Court, again not by the Sixth Circuit, based precisely upon the specific facts and evidence in the record. (Pet. App. at 23a) ("After a thorough review of the relevant law, and the arguments and evidence set forth by the parties as to this issue, the Court finds that the drawings do not constitute copyrightable expression.").

3. While the Petitioner would like to have this Court believe that the Sixth Circuit's opinion conflicts with the Second Circuit's decision in *Sparaco v.*

Lawler, Matusky, Skelly Engineers, LLP, 303 F.3d 460 (2nd Cir. 2002), *cert. denied*, 538 U.S. 945 (2003), such is clearly not the case. Indeed, because the copyright issue was not addressed by the Sixth Circuit, its opinion here does not even cite to or discuss *Sparaco*. What Petitioner is complaining about is the District Court's application of *Sparaco*. (Pet. at 6-7). However, while this Court's rules allow for granting *certiorari* when two courts of appeals have made decisions in conflict with one another, that practice does not apply when a district court has arguably reached a conclusion at odds with a decision of another court of appeals. Sup. Ct. R. 10(a), see also, *C.I.R. v. Bosch's Estate*, 387 U.S. 456, 457 (1967).

While Petitioner seems to take issue with the fact that the Sixth Circuit did not expressly disavow the District Court's application of *Sparaco* – assuming there was reason to do so,[3] there is no indication that the Sixth Circuit failed to consider the arguments presented to it in this appeal merely because it did not issue a more comprehensive opinion. *Taylor v. McKeithen*, 407 U.S. 191, 194 (1972) (recognizing that "the courts of appeals should have wide latitude in their decisions of whether or how to write opinions.").

---

[3] DS&C maintains, as it did in the courts below, that the *Sparaco* opinion actually supports the entry of summary judgment in its favor.

4. Petitioner also maintains that review is warranted here because the Sixth Circuit's determination that summary judgment was appropriately entered in favor of DS&C deviates from "a single uniform system" of copyright law and jeopardizes "uniform application" of the Copyright Act of 1976. (Pet. at 11, 13). This meritless argument must be rejected. It too is predicated upon the specious assertion that the Sixth Circuit has imposed a "categorical rule denying copyright protection to works expressly included in the copyright statute * * * ." (Pet. at 13). As established above, no such "categorical rule" has been recognized, espoused or hinted at by the Sixth Circuit's opinion in this case. Not even the District Court's opinion can be read to have adopted a "categorical rule" of such a nefarious impact as that suggested by Petitioner.

B. The Sixth Circuit's Disposition of this Case Based Solely Upon State Contract Law Principles Does Not Warrant Discretionary Review by this Court.

1. Petitioner's preemption argument (Pet. at 21-24), was never made in the courts below. This Court does not consider issues that are raised for the first time in the petition for *certiorari*. See, *United States v. Ortiz*, 422 U.S. 891, 898 (1975). Consequently, this case should not be accepted on the grounds that the Sixth Circuit's opinion on the contract issue is contrary to 17 U.S.C. §301(a). Even though the issue was

not properly raised by Petitioner before the District Court and the Sixth Circuit, there is no indication here that the Sixth Circuit did not "view all contracts involving copyrightable subject matter through the prism of the Copyright Act." (Pet. at 23).

2. Petitioner has never questioned whether the contract that Grusenmeyer had with Magnificat is unambiguous. The District Court expressly found that the parties' contract is unambiguous. (Pet. App. at 26a). In the Sixth Circuit, Petitioner argued that the contract documents were unambiguous. According to the plain language of the contract, Grusenmeyer was to prepare a Master Plan "'for the implementation of the capital improvements program, including plans, renderings and perspectives suitable for use in the presentation and future reference during master plan implementation.'" (Pet. App. at 26a). As provided in the contract, the program for capital improvements included the building of a Fine Arts/Band Practice/Auditorium type space. It has never been disputed that Grusenmeyer provided Magnificat with existing conditions drawings, and that those drawings were used by DS&C in connection with the development of the Performing Arts Center at Magnificat. As such, the existing conditions drawings fall within the scope of Grusenmeyer's responsibilities under the contract, for which Magnificat paid approximately $15,000. (Pet. App. at 26a-27a).

Based upon these facts and evidence in the record, the District Court determined that

> It is consistent with logic that drawings of existing conditions would be necessary for the implementation of the capital improvements program and would therefore be included within [Grusenmeyer's] responsibilities under the contract. Equally logical is the fact that such drawings may be used in the implementation, in return for the compensation that Magnificat paid to [Grusenmeyer].

(Pet. App. at 27a). The Sixth Circuit agreed:

> We agree with the district court's conclusion that, contrary to [Grusenmeyer's] assertions, the contract permits the use, as described, of the materials developed under it. Otherwise, the contract provision stating that Grusenmeyer would "[p]rovide . . . plans, renderings, and perspectives suitable for use and future reference during master plan implementation" would be meaningless.

(Pet. App. at 13a).

3. Petitioner's imagined and hyperbolic dilemma said to be facing architects, surveyors, mapmakers and other technical artists should the Sixth Circuit opinion be allowed to stand is mere sophistry. (Pet. at 26-30). The Sixth Circuit decision affirming summary judgment does not "cast[] doubt on the independent legal significance of the American Institute of Architects' standard contract documents to

prevent transfer of an architect's copyright interests." (Pet. at 29). The AIA form contract actually supports the summary judgment here. As the Sixth Circuit's opinion clearly noted, the outcome in this case was predicated upon the unique fact that Grusenmeyer had prepared his own written contract – i.e., the two-page letter agreement – wherein permission was given for the use of the materials developed by Grusenmeyer as part of the Master Plan for the implementation of the capital improvements program at Magnificat. (Pet. App. at 12a-13a). Petitioner's argument, repeated here (Pet. at 25), that this permission extended only to Magnificat and not professionals, like DS&C, who were hired to implement the Master Plan was found by the Sixth Circuit to "border[] on the absurd." (Pet. App. at 13a).

Magnificat paid Grusenmeyer approximately $15,000 to prepare, in part, an existing condition plan. The contract provided, in relevant part: "3. Provide a master plan for the implementation of the capital improvements program, including plans, renderings and perspectives suitable *for use in the presentation and future reference during master plan implementation.*" (Pet. App. at 7a) (emphasis sic). This was contained in the two-page letter agreement prepared by Grusenmeyer – a writing separate and apart from the AIA Abbreviated Form Agreement.

Article 6.1 of the AIA Abbreviated Form Agreement, which was purportedly incorporated by reference in the Grusenmeyer-Magnificat contract, grants permission for use of the drawings. This section

provides that the drawings prepared by the architect can be utilized on other drawings if agreed to in writing and if the architect is compensated. As set forth in the preceding paragraph, Grusenmeyer and Magnificat did agree that the plans prepared by Grusenmeyer could be utilized for future reference during the Master Plan implementation and Grusenmeyer was, in fact, compensated accordingly. None of the cases cited by Petitioner have facts analogous to this case. Indeed, the Sixth Circuit rejected Grusenmeyer's insistence that the Circuit's opinion in *Johnson v. Jones*, 149 F.3d 494 (6th Cir. 1998) mandates a reversal of the District Court's order, "because we conclude that the facts in that case are fundamentally distinct from those now before us." (Pet. App. at 14a).

II. THIS CASE IS NOT A PROPER VEHICLE FOR RESOLVING THE QUESTION PRESENTED.

Finally, and quite apart from the Petition's failure to satisfy the criteria of Rule 10, review is also unwarranted because this case is an exceptionally poor vehicle to resolve any question presented. Despite the recent enactment of Fed. R. App. P. 32.1(a),[4] only "[r]eported panel opinions are binding

[4] See also, 6 Cir. R. 28(g), which reads in its entirety as follows:

> (g) Citation of Unpublished Decisions. Citation of unpublished opinions is permitted. FRAP 32.1(b) applies to all such citations.

on subsequent panels" in the Sixth Circuit. 6 Cir. R. 206(c). See also, *Bell v. Johnson*, 308 F.3d 594, 611 n. 7 (6th Cir. 2002). It has not been the ordinary practice of this Court to grant *certiorari* when a decision sought to be reviewed is unpublished, and there is no compelling reason to do otherwise here. There is no cause for this Court to expend its limited resources in hearing an appeal of this nature or in resolving a purported conflict when "even the court that rendered the decision may reach a different conclusion in the next case presenting the issue." ROBERT L. STERN ET AL., SUPREME COURT PRACTICE §6.37(c), at 459 (8th ed. 2002); see, e.g., *Aerel, S.R.L. v. PCC Airfoils, L.L.C.*, 448 F.3d 899, 907 (6th Cir. 2006) (Sixth Circuit refused to recognize two unreported opinions as the rule purportedly adopted by "these nonprecedential opinions is unwarranted.").

The decision below faithfully applied relevant precedent, and Petitioner, at best, merely asks the Court to examine whether the District Court and Sixth Circuit correctly applied settled law. Petitioner may quarrel with how the courts applied the law to the facts of the case, but that is not the sort of "error" worthy of a grant of *certiorari*. Sup. Ct. R. 10. There is no reason why this Court should review a fact-specific ruling that in no way conflicts with the decisions of this Court or other courts of appeals.

CONCLUSION

Petitioner has not established any compelling reason for this Court to grant the Petition. Wherefore, the Petition for a Writ of *Certiorari* should be denied and the Sixth Circuit opinion allowed to stand.

Respectfully submitted,

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In The

Supreme Court of the United States

JEFFREY A. GRUSENMEYER & ASSOCIATES, INC.,
Petitioner,

v.

DAVISON, SMITH & CERTO ARCHITECTS, INC.,
WILLIAM R. DAVISON
RANDALL S. SMITH
JEFFREY M. CERTO,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONER'S REPLY BRIEF

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QUESTIONS PRESENTED FOR REVIEW

Whether architectural drawings of existing conditions should be denied copyright protection as a categorical rule.

Whether the phrase in an architect's contract that says he would prepare "plans, renderings, and perspectives suitable for use in presentation and future reference" by his client, should be construed by a court to permit a competing architect to copy, adapt, distribute, and display those works as its own without considering the effect of the Copyright Act of 1976 on the contract language.

CORPORATE DISCLOSURE STATEMENT

Petitioner Jeffrey A. Grusenmeyer & Associates, Inc. has no parent corporation, and no publicly held corporation owns more than 10% of its stock.

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REPLY TO BRIEF IN OPPOSITION

Jeffrey A. Grusenmeyer & Associates, Inc. ("Petitioner") petitioned the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case, in order to resolve a conflict between the Sixth Circuit, which now holds that architectural drawings of existing conditions are not eligible for copyright protection, and the Second Circuit's decision in *Sparaco v. Lawler, Matusky & Skelly Engineers LLP*, 303 F.3d 460 (2nd Cir. 2002) which holds that a site plan depicting existing conditions can be copyrightable. The petition also seeks review of the degree of deference courts must show the Copyright Act of 1976 in state law contract interpretation.

Pursuant to Supreme Court Rule 15.6, Petitioner herein replies to assertions made in Respondents' Brief in Opposition.

I. The Sixth Circuit Fully Considered the Copyright Issues Presented in the Petition for Certiorari

Respondents assert that the Sixth Circuit never addressed the issue of whether Petitioner's drawings were or were not subject to copyright protection. (Respondents' Brief in Opposition, at 13) (hereinafter "Opp."). Respondents further assert that the copyright issue in this case was decided by the District Court, and not by the Sixth Circuit. (Opp. at 14). Contrary to Respondents' assertions, Grusenmeyer raised this issue on appeal before the Sixth Circuit, and again in the Petition for Rehearing, wherein he stated, "Grusenmeyer has not abandoned his appeal of the district court's opinion regarding his copyright. Left unresolved by the Court, Grusenmeyer may have no recourse against any future infringement of his registered work by others...." (Petition for Rehearing, at 12). The Sixth Circuit denied the rehearing

because, "the issues raised in the petition were *fully considered upon the original submission* and decision of the case." (Petition for Writ of Certiorari Appendix, at 4a) (hereinafter "Pet. App.") (emphasis added).

Respondents also assert that Grusenmeyer's preemption argument was never made in the courts below and that "this Court does not consider issues that are raised for the first time in the petition for certiorari." (Opp. at 16). The preemption argument in support of Grusenmeyer's position is that the contract between Grusenmeyer and Magnificat can not be interpreted in the manner it was, if the courts below had applied the limitations of the Copyright Act.

Contrary to Respondents' assertion, Grusenmeyer cited to *Ritchie v. Williams*, 395 F.3d 283 (6th Cir. 2005), and 17 U.S.C. § 301(a) in arguing to the Sixth Circuit the importance of complete federal preemption in interpretation of contracts involving copyrightable subject matter. The following excerpt is from Grusenmeyer's Petition for Rehearing:

> The Copyright Act of 1976 preempts state law and controls contract claims involving copyrightable subject matter. *Ritchie*, 395 F.3d at 286-288; 17 U.S.C. § 301(a). The contract was intended to *protect* Grusenmeyer's copyrights, not give them away. Payment for the extensive 'master planning services' and the subsequently delivered printed copies of the Master Plan, only entitled Magnificat to ownership of those particular printed copies, and use of the *factual information* contained therein—no more. 17 U.S.C. § 202 (transfer of the material object does not convey any rights in the copyrighted work embodied in the object). The contract between Grusenmeyer and Magnificat only transferred

ownership to Magnificat of the printed hard copies of the Master Plan.

Even if the district court and the panel *assume* that the infringed electronic AutoCAD® drawings were obligated under the contract, the contract did not transfer ownership of Grusenmeyer's copyrights in them. 17 U.S.C. § 204(a) (requiring any transfer of rights to be in writing). "'No magic words must be included in a document to satisfy § 204(a).' It must, however, show *an agreement to transfer copyright*." *Lyrick Studios, Inc. v. Big Idea Productions, Inc.*, 420 F.3d 388, 392 (5th Cir. 2005) (emphasis added), *citing Television Espanola S.A. v. New World Entertainment, Ltd.*, 183 F.3d 922, 927 (9th Cir. 1999). "Transfer of the physical object does not transfer statutory copyright. To the extent that a writing is ambiguous as to whether it refers to copyright or physical interest, it could fail to transfer copyright ownership." 3-10 *Nimmer on Copyright* § 10.03 [A][3].

The right of display is distinct from the right of reproduction. 17 U.S.C. § 106. Granting permission to 'present' does not grant a license to copy, adapt, or distribute. Granting permission to 'refer to' does not grant a license to copy, adapt, distribute, or display. The only one of the exclusive rights of copyright that Magnificat may have received a license to, is that of 'display.' However, even then, such display would have to be of Grusenmeyer's work, not of someone else's infringing adaptation or copy of that work. The panel's opinion therefore, sharply restricts the scope of the Copyright Act's authority that Congress conferred in 17 U.S.C. § 301.

(Petition for Rehearing, at 10-11). To repeat, the Sixth Circuit denied the rehearing because, "the issues raised in the petition were *fully considered* upon the original submission and decision of the case." (Pet. App. at 4a) (emphasis added).

By affirming the district court, the Sixth Circuit adopted its reasoning that architectural drawings of existing conditions are not copyrightable as a matter of law. (Pet. App. at 23a) ("Like the site plan in *Sparaco*, Plaintiff's drawings set forth the existing physical characteristics of the facilities at Magnificat and, as such, they set forth facts."). As a consequence, Grusenmeyer now has no recourse against any future infringement of his registered work by others. The categorical rule that architectural drawings of existing conditions are mere facts, and not copyrightable, will imperil the exclusive rights expressly afforded by Congress in the Copyright Act of 1976.

II. Respondents Admitted to Verbatim Copying

Respondents state in their Brief in Opposition that, "DS&C has admitted only that it received a disk from Magnificat that exclusively contained existing conditions." (Opp. at 7). Instead, in their Brief in Opposition to Plaintiff's Motion for Summary Judgment, the Respondents stated the following:

> Defendants admit that they obtained a copy of Plaintiffs drawing of existing conditions from Magnificat High School ("Magnificat") in AutoCAD format. Defendants admit incorporating the existing conditions in some drawings of the Magnificat Performing Arts Center. Defendants admit that Plaintiff obtained copyrights for his drawings which

> included existing conditions. ...These admissions do not render Plaintiff's work original....

(R.34-1, Defendants' Opposition to Plaintiff's Motion for SJ, at 2). Respondents stated further, "these facts relevant to Plaintiff's Motion for Summary Judgment are not in dispute." (Id.).

Respondent Certo testified in deposition to the extensive copying of Grusenmeyer's work, including drawings bearing the DS&C architectural seal that were instead entirely authored by Grusenmeyer. (R.31-2, Certo Depo., at 23-25); (R.38, Certo Depo., Exhibit 6). Grusenmeyer asserted in his Reply Brief before the Sixth Circuit that at least 31 drawings bearing the DS&C architectural seal contained his work, including eight that were 100% verbatim copies of his drawings. (Reply Brief of Appellant Jeffrey A. Grusenmeyer & Associates, Inc., at 12). Those assertions remain unrebutted by the Respondents.

III. Grusenmeyer Did Not Copy Drawings of Existing Conditions Made By Others

Respondents state that Grusenmeyer "utilized" existing drawings, including some that had been prepared by DS&C in connection with earlier renovations. (Opp. at 5). Respondents later state that DS&C "confirmed and then utilized, if confirmed, the drawings of the existing conditions...." (Opp. at 7). However, Grusenmeyer was careful not to do what Respondents did in this case. Any use of preexisting material by Grusenmeyer was limited to extracting *factual information*, such as dimensions and elevations. (Pet. App. at 31a-34a). Grusenmeyer then created his own original expression of the campus of Magnificat. (Id.).

Respondents further assert that DS&C's conduct "was done as part of the protocol of the industry." (Opp. at 7). If this is, or was to become, the industry protocol, it is all the more reason for this Court to grant *certiorari* in this case. Indeed, the law of copyright forbids such copying, and those who do engage in it thwart the Congressional intent to preserve the copyrights of those who don't.

IV. AIA Provisions Were Part of the Contract

Respondents state that Grusenmeyer never provided Magnificat with the AIA Document B151: Abbreviated Form of Agreement Between Owner and Architect, 1987 Edition. (Opp. at 3). Respondents assert that the two-page letter agreement between Grusenmeyer and Magnificat was, "a writing separate and apart from the AIA Abbreviated Form Agreement." (Opp. at 19). However, "[w]hen documents are incorporated by reference into a document, they are to be read as though they are restated in the contract." *Inland Bulk Transfer Co. v. Cummins Engine Co.*, 332 F.3d 1007, 1016 (6th Cir. 2003), citing *Blanchard Valley Farmers Cooperative, Inc. v. Rossman*, 761 N.E.2d 1156, 1162 (Ohio App. 2001). The district court recognized as much when it noted in its decision that the AIA Document was incorporated in the contract. (Pet. App. at 27a, fn. 3). The Sixth Circuit did not reverse this finding.

"Where one instrument incorporates another by reference, both must be read together. 18 Ohio Jurisprudence 3d (1980), *Contracts*, § 152. Courts should attempt to harmonize provisions and words so that every word is given effect. *Id.*, § 157." *Christe v. GMS Mgt. Co.*, 705 N.E.2d 691, 693 (Ohio App. 1997). Since the AIA document and the two-page letter agreement are part of the same contract, the two-page letter agreement can not be the separate agreement

with "additional compensation" required by AIA Article 6.1, as previously interpreted by the Sixth Circuit in *Johnson v. Jones*. 149 F.3d 494, 500 (6th Cir. 1998).

V. The Petition Rests on Purely Legal Grounds

Respondents assert that, "there is no reason for this Court to review such a fact-specific decision...." (Opp. at 14). However, the facts of this case describe the widespread use of the American Institute of Architects Standard Forms of Agreement, which would now seem to command little respect. If the Court of Appeals decision has persuasive effect, there will be those who may want to ignore the copyright protection provisions of the AIA forms when it suits them to do so.

Further, this was a summary judgment disposition at the district court, based on material facts not in dispute. The Petition for Writ of Certiorari rests purely on legal principles—principles such as those found in 17 U.S.C. § 101, which defines "pictorial, graphic, and sculptural works" (expressly granted copyright protection in § 102(a)(5)), to include technical drawings, which encompasses architectural plans; and 17 U.S.C. § 106, which defines the exclusive rights protected by copyright, so that granting a right to display does not mean that any other right has been so granted; and 17 U.S.C. § 202, which states that ownership of any material object in which the work is embodied is not the same as ownership of the copyright, or of any of the exclusive rights under a copyright; and 17 U.S.C. § 204, which requires that any transfer in copyright ownership must be evidenced by a signed writing indicating the transfer; and 17 U.S.C § 301, which makes clear that the Copyright Act preempts any state law claim involving the subject matter of copyright as specified by § 102.

VI. Contrary to Respondents' Assertions, Petitioner's Arguments are Not Concocted, Specious, Artificial, Meritless, Nefarious, Hyperbolic, or Mere Sophistry

Respondents assert that "resolution of the [circuit] conflict would not alter the Sixth Circuit's affirmance of the District Court's summary judgment on the dispositive contract issue." (Opp. at 10). However, this Court of Appeals decision has implications beyond the parties to the current litigation.

Already, another circuit is being urged to accept the Sixth Circuit's adopted rule, regarding architectural drawings of existing conditions, to invalidate copyrights for other drawings of a technical nature. See *Meshwerks, Inc. v. Toyota Motor Sales U.S.A., Inc.*, 2006 WL 2623935 at *3 (D. Utah 2006) (district court decision).[1] Respondents' ridicule of this case as "an exceptionally poor vehicle to resolve any question presented" (Opp. at 20), does not inform the reader—and although annoying, it cannot obscure the question as to whether the persuasive effect that the Sixth Circuit opinion could have on other circuits is reason enough to grant the writ.

Respondents state that, "[t]he disk provided to DS&C did not have any of Grusenmeyer's original ideas; it was all

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[1] The case is currently before the Tenth Circuit Court of Appeals, Case No. 06-4222, and is scheduled for oral argument in November, 2007. In briefing, the Appellees have cited to the district court decision in *Grusenmeyer* (noting the Sixth Circuit's affirmance), *ATC Distrib. Group, Inc. v. Whatever It Takes Transmissions & Parts, Inc.*, 402 F.3d 700 (6th Cir. 2005), and *ATC's* version of the *Sparaco* decision (despite the *Sparaco* decision's holding to the contrary), in support of the district court's judgment denying copyright to digitized models of Toyota automobiles.

existing conditions." (Opp. at 6-7) (emphasis added). The Sixth Circuit's Opinion states that, according to the individual DS&C architects, verbatim copying "is accepted practice ...without first seeking permission where the drawings utilized merely document *existing conditions*." (Pet. App. at 9a) (emphasis added). The Sixth Circuit apparently agreed with the DS&C individual architects' dogmatic insistence that, as a category, architectural drawings of existing conditions are undeserving of copyright protection. Respondents' contract argument is pretextual, with the ultimate issue in this case being the copyrightability of architectural drawings of existing conditions.

CONCLUSION

Along with the reasons asserted in the Petition for Writ of Certiorari, for all the foregoing additional reasons, the petition should be granted.

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